Task Force on the Law Concerning Trespass to Publicly-Used Property as it Affects Youth and Minorities

Raj Anand
Chairman

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Task Force on the Law Concerning
Trespass to Publicly-Used Property
as it Affects Youth and Minorities

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concernant la violation de propriété
publique sur les jeunes et les
minorités

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March 16, 1987

The Honourable Ian G. Scott
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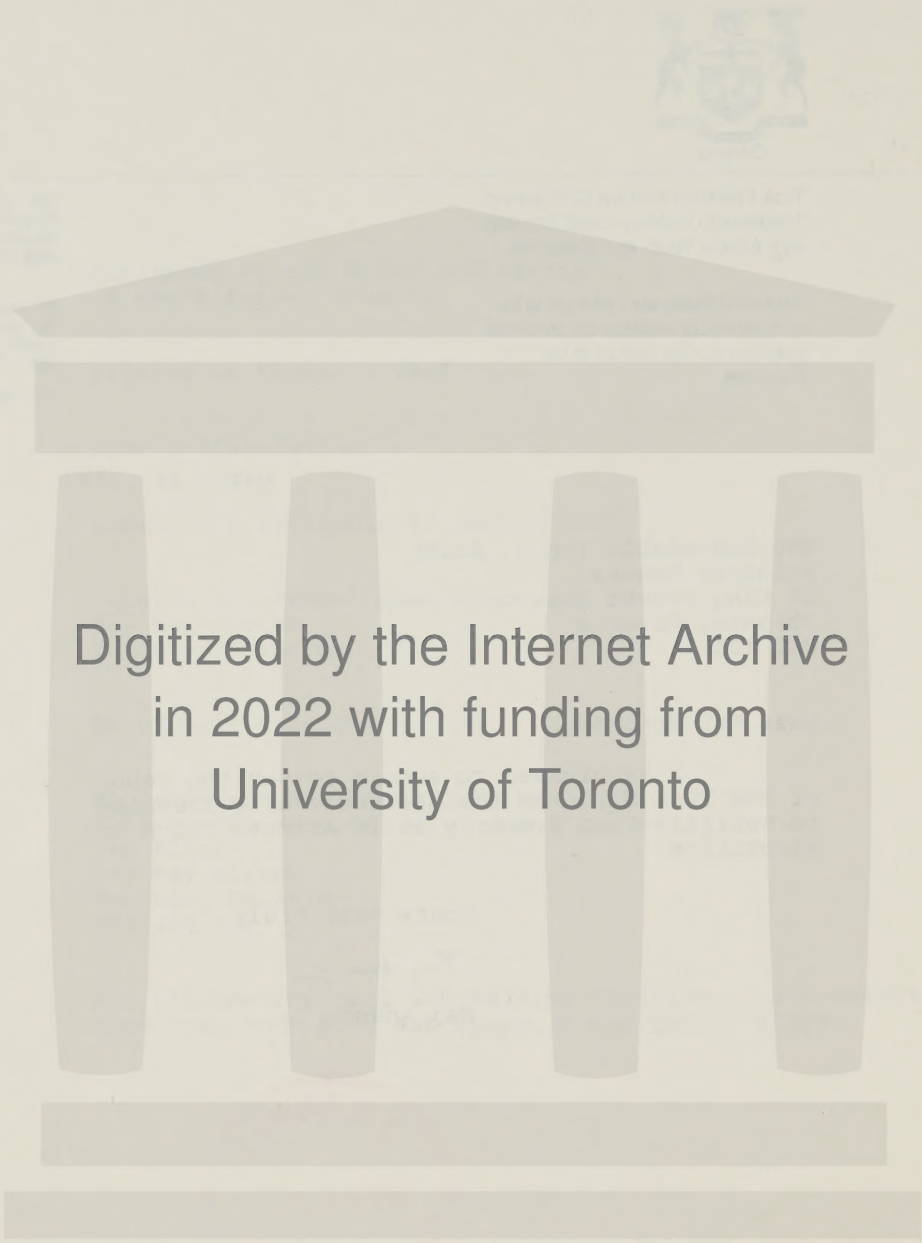
Dear Mr. Attorney:

I am pleased to submit to you the report of the Task Force on the Law Concerning Trespass to Publicly-Used Property as it Affects Youth and Minorities.

Yours very truly,

Raj Anand



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I wish to acknowledge, with gratitude, the assistance of my colleagues in preparing this report:

Inge Sardy	Task Force Registrar
David Muir	Student-at-Law
Eric Stine	Word Processing Operator
Alison Colvin	Law Librarian

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EXECUTIVE SUMMARY AND LIST OF RECOMMENDATIONS

Terms of reference

This Task Force was appointed on June 23, 1986 to investigate the concerns expressed to the Attorney General of Ontario regarding the law of trespass as it pertained to publicly-used property. Specifically, allegations were made concerning unduly restrictive and discriminatory enforcement of the Trespass to Property Act against youth and minorities by owners of publicly-used property.

For purposes of this report, the "target groups" have been defined as (1) young people between the ages of 12 and 25, and (2) visible minorities and the poor. Publicly-used property means property to which the public is normally admitted, regardless of its public or private ownership, and includes the common areas of shopping malls and plazas, transportation facilities and terminals, universities, public attractions such as the Exhibition, Ontario Place and sports stadiums and municipal parks, playgrounds and plazas. Stores and restaurants display attributes of publicly- and privately-used property in varying degrees. School and hotels are "hybrid" properties, in that the public is not ordinarily admitted to schools during most of the year, while the largest part of most hotels is designed for private accommodation and not public use.

An extensive consultative process was carried out, including receipt of written submissions; meetings with affected groups and experts; informal requests for information; on-site visits; and discussion of principal recommendations with an Advisory Committee representing the interested parties, prior to completion of this report.

The Trespass to Property Act, 1980

The traditional common law of trespass to property was predicated upon absolute notions of private property and its attributes, such as the right to exclude others. The last two centuries of industrialization and other social change have seen an accelerating process of limitation of private property rights where public and private interests in the use of such property have diverged. As late as the mid-1970's, the Supreme Court of Canada enunciated a "duty of common humanity" on property owners toward trespassers who suffered injury.

Viewed in its common law context, the T.P.A. was unfortunate in certain respects. It took no account of the developing trends in balancing the competing social interests in publicly-used property. It instead crystallized the absolutist common law position in Ontario, and thereby foreclosed further development. The T.P.A., like its predecessors, makes no distinction between different types of property and the degree of

public use. Under the Act, a shopping mall is no different than a private home, in that it carries with it a general right of exclusion of any visitor, and the exercise of this right is legally subject to the owner's whim.

Potential for abuse

On its face, the T.P.A. creates the potential for unduly restrictive or discriminatory enforcement against minorities and youth. An occupier or manager of publicly-used property or a security guard can require any member of the public to leave the property at any time, for any reason, or for no reason at all. This can be accomplished either orally or by written notice. If the person does not leave immediately, he or she commits an offence punishable by a fine of up to $1,000 and may be arrested by the official and delivered into the custody of a police officer. Failure to pay can result in a jail term under the Provincial Offences Act.

Moreover, there is no necessary time limit on the prohibition against entry. Thus, unless the occupier voluntarily limits the duration of the "ban", the visitor who leaves when directed to do so cannot re-enter the property later the same day, or the next day, or indeed the next year.

Wide "prosecutorial" discretion is vested in the occupier of publicly-used property to choose when,

how and for how long to exclude any individual person among the multitudes who avail themselves of the general invitation to enter such property. The T.P.A. is unusual in that it places private citizens - those who own publicly-used property - in the central role of policing this Act. Implementation of society's prohibition against unacceptable conduct is left largely in hands of persons who have no necessary accountability or indeed training for the role. Furthermore, there is no requirement in the T.P.A. of an overt act or misconduct by an unwanted visitor other than sheer presence on the premises. It is the occupier's right to exclude for the simple reason that "this is private property". This virtually absolute discretion is seriously out of step with the role and social significance of publicly-used property, particularly shopping centres, in contemporary Ontario society.

Public perceptions

The widespread public perception is that shopping centres are "public property" or "public places", in the sense that persons have the right to enter freely, walk around, converse with others and remain within the common areas as long as they wish, much as they would conduct themselves in a city square. This public perception was asserted by most individuals and representatives of youth and minorities (the "user groups") and was acknowledged by most of the owners and enforcers of the Act (the "owner groups"). The

inconsistency between the legal position and the common understanding was cited by the police forces, security officers and the Ontario Human Rights Commission as a central problem which resulted in strained communications between enforcement officials and the public, and frequent resentment by minority groups and young people.

Social importance and social responsibility

Academic research confirms the evidence received by this Task Force: that there is a lack of suitable community facilities for people - particularly young people - to simply meet, converse, "see and be seen"; that these needs are vital ones, and providing them is a prinicipal function of urban and town planning; and that shopping malls have willingly and for good commercial reasons accepted this role. The central role of shopping centres as a location for community interaction is reflected in the fact that in terms of time spent by the average citizen, shopping centres rank third, after (1) home and (2) work or school.

"Hanging out" is not a problem in itself. It is a healthy and indeed necessary pastime in a contemporary world which is increasingly dominated by the concerns of family and work. In earlier Ontario society and in many of the countries of origin of recent immigrants "hanging around" on street corners and squares has been indispensible to effective social

participation. In Ontario, suburban areas frequently grew up without much planning for public spaces and social facilities, and malls became the accidental capitals of suburbia. In downtown areas, shopping malls literally displaced and enclosed city streets, street corners and plazas. Into the mall and onto its closed streets, have been added most of the amenities associated with community life; moreover, essential services are often found in shopping plazas and nowhere else in the neighbourhood.

Shopping centre representatives stressed the role of these facilities as community centres with community responsibilities to the towns which they serve. It was important for such places to become an integral part of the community around them, and to provide more than a selection of materials and goods. There has, however, been an insufficient recognition by owners of publicly-used property of the need to provide for the uses by the public which may not contribute, directly or indirectly, to the principal goal of profitability. The privatization of the town square must carry with it a corresponding obligation to provide for "non-productive uses". This obligation must be implemented through legal recognition in the T.P.A. of the public use of such private property and by addressing design issues in the construction of publicly-used spaces.

Evidence of the owner groups

According to the senior management of the owner groups, the T.P.A. provides a system of graduated responses to deal with offensive behaviour, and is not used in any cases in the absence of such behaviour. The graduated responses consist of a request to stop the misbehaviour, followed by a warning, followed in turn by a ban notice, and upon return or repetition, an arrest and prosecution. It was asserted that the more severe sanctions are imposed only in the last resort, after lesser measures have proven ineffective. Thus, although the unfettered discretion to exclude exists under the T.P.A., it is only intended to be used in response to incidents of identifiable misbehaviour which represent a disruption to the activities of the publicly-used property. In most cases, ban notices were issued without time limitation.

The evidence provided on behalf of shopping centres, office buildings, the Canadian National Exhibition, the Toronto Blue Jays and Argonauts, the Toronto Transit Commission, the University of Toronto, the Hotel Security Chiefs' Association, the Retail Council of Canada and police forces showed that statistically, the number of persons charged or banned under the T.P.A. was a very small proportion of the "traffic counts" of these properties.

Evidence of the user groups

There is a widely held perception among minority groups and young people that the T.P.A. is enforced in a discriminatory way against them. Congregating in groups is seen as acceptable for those who are white, normal or "middle-class" in their appearance, but as threatening or disruptive for the young, for visible minorities, for the poor, and generally for those exhibiting an "alternative lifestyle". This perception leads to confrontation between visitors and security guards, often resulting in escalating tensions. These tensions are themselves exacerbated by the absence of any obligation on the part of security guards to give reasons for asking visitors to leave, and their frequent refusal to do so. These perceptions are compounded when police officers enforce the Act on behalf of property owners, since they are seen to be "taking sides" or "doing the bidding" of private property owners at the expense of these user groups.

These perceptions are reinforced by dozens of specific incidents which were brought to the attention of this Task Force. Virtually every young person, as well as the groups representing youth and minorities, cited specific incidents in which security officers, in particular, had focused on individuals or groups within these categories, and had either demanded that they move on or preemptorily banned or arrested them, apparently

without reason. The perceived injustice frequently led to verbal and/or physical confrontations. In some cases, individuals have stopped frequenting certain downtown shopping areas in spite of the lack of adequate alternatives for the amenities they provide. One youth services agency estimated that 90% of its clients had been charged with trespassing at one time or another.

Surveys were done for the Task Force by the Children's Aid Society of Metropolitan Toronto and the Ontario Human Rights Commission, and other evidence was provided by the Council on Race Relations and Policing, several community legal clinics and alternative schools, lawyers who had acted for defendants charged under the T.P.A. and many individuals.

Users perceived that owners and their security guards considered groups of people "hanging out" as threatening or as transformed into "gangs" by virtue of their youth, their clothing or their race. This perception was confirmed by the owners of some malls. Some adopted this interpretation of "threat" themselves; many owners said that while it was not their view, it was the view of a majority of their customers, and their business interests demanded that this majority be protected from unsettling or disruptive influences in order to maintain a proper shopping environment.

Conclusions on the evidence

This last element - the perceived fears and preferences of the "average" user of publicly-used property - links and explains the seemingly irreconcilable accounts of the owner and user groups. The two sets of submissions are not inconsistent, but in fact fit together well.

The two accounts represent descriptions of different events. The owners describe their policies and their instructions to their agents, and the users describe the implementation of the Act on the "shop floor". The virtually absolute discretion conferred on owners is exercised on a day to day basis toward a principal aim of commercial self-interest, which is thwarted by the existence of turmoil or discomfort, or threats to the average or "majority" members of the public. Unfortunately, the T.P.A. imposes a zero threshold of disruption to a commercial enterprise, and so it is inevitable that situations which do not constitute real threats, or which should be within society's tolerance in a publicly-used place, are reason enough for action under the T.P.A. Action of this kind has its greatest impact on those who are farthest from the majority group in status, appearance or behaviour: the young, the poor and the visible minorities.

The statistics cited by the owner groups do not conflict with this conclusion, since the figures

cited regarding use of the T.P.A. do not correspond with the incidents described by the users. Under the present Act, there is no obligation to record a reason for excluding or for prosecuting, since no reason is necessary other than the presence of the visitor on the property. Thus, a large proportion of the statistics relate to "loitering" or "suspicious activities", in circumstances where no offence other than trespassing is alleged.

The evidence of the user groups is anecdotal but reliable. There is no central compilation of statistics regarding the frequency and nature of such incidents, since "unduly restrictive or discriminatory enforcement" is simply irrelevant to the "status" offence of trespass. Moreover, minority groups and young people do not frequently invoke traditional channels of reporting and complaint in response to exclusion from publicly-used properties.

One of the central problems is the virtual absence of written policies and procedures from senior management to security staff in the enforcement of the T.P.A. Instruction seems to concentrate on corporate and community image and the need to provide a secure and controlled environment. These objectives can translate quite readily into unwarranted exclusion of "undesirables".

Moreover, the formulation of policy at the corporate level has been lax. Again, this is understandable, in that the present T.P.A. requires no such policy and leaves such decisions to the individual discretion of security guards. Security guards, in turn, unequivocally maintained that whether or not a group of people were being disruptive, a store or mall owner had the right to remove them and the security officers were required to carry out these wishes. There was no evidence that security guards received training in human rights, multi-culturalism or tolerance of varying lifestyles; again, there is nothing in the T.P.A. that demands it.

Conclusions

The private ownership of most of the publicly-used properties under consideration is not a conclusion in itself, but rather one factor to be considered in determining the proper balance of public and private interests which must underlie legislative change.

Far from avoiding escalation, the T.P.A. is a cause of it. The disturbing gap between community expectations and the law of trespass frequently results in frustration and verbal altercations between visitors and security guards, police officers and managers. The visitor's refusal to leave and the guard's refusal to give a reason leads inexorably to physical confrontation

in the form of arrest, detention and removal. Thus, trespass charges often accompany or are overtaken by more serious charges such as assault and obstruction of justice.

Perceived inadequacies in the public justice system, such as overtaxed criminal courts, constitute no basis for the substitution of a private justice system open only to those who own private property.

Various suggested alternatives to formal statutory amendment - such as defending T.P.A. changes, invoking the Charter or filing a complaint under the Human Rights Code - would only serve to cure symptoms of the problem, and not its cause, which is the unbridled discretion to exclude visitors to publicly-used property.

RECOMMENDATIONS

A requirement of cause

At a minimum, the virtually absolute discretion accorded to occupiers of publicly-used property must be limited by providing for a definition of misconduct which is sufficient to justify exclusion or prosecution of a visitor.

A legal regime for publicly-used property

There are two realistic alternatives for a legal regime to govern trespass. In either case, publicly-used property must be exempted from the unlimited discretion in the provisions of the present T.P.A..

(A) Prohibition against unreasonably inconsistent use

The first alternative involves the substitution of a standard of misconduct represented by "unreasonably inconsistent use" as the triggering event for sanctions under the Act. This criterion can be supplemented by a list of prohibited acts, such as fighting, vandalism, obstruction of pedestrian access and so on. Notices such as signs should also be provided for and encouraged, although the list provided by the owner would not be determinative of what constitues forbidden behaviour. At trial, a judge would be required to assess the misconduct alleged by the occupier in light of the circumstances such as the nature of the act; its timing and persistence; the existence of one or more warnings; the nature of public use of the property; the degree of disruption and the consequences for the occupier and the public; and the existence of any prior notice by way of signs or tickets.

Because of the generality of the definition of misconduct, fine distinctions need not be made between different types of publicly-used property. "Publicly-used" can be defined as "property to which the public is normally admitted, regardless of whether ownership is public or private".

(B) The town square analogy

This second alternative involves the withdrawal of trespass laws from publicly-used properties on the basis of their contemporary importance, which places them in the same role as the town squares and public markets of earlier years, from the standpoint of the public interest.

This legal scheme would ensure that during those times when the general public is admitted, visitors would be subjected to the same norms of conduct that regulate the public square, in line with the contemporary expectations of the average entrant.

The conduct of visitors would be regulated by the extensive legislative scheme which is presently in place, including the Criminal Code, provincial statutes and local regulations and by-laws. Local authorities should be given delegated powers to pass by-laws such as those now available to the Toronto Transit Commission and the Exhibition, and to municipalities in their control of public parks and city streets.

Both legal regimes have analogies in present state legislation in the United States. Moreover, the essence of the "town square" proposal is presently in place in portions of three shopping malls in Toronto, Ottawa and Thunder Bay, and is advocated by the City of North York for its Downtown North York development.

Design issues

It is feasible to facilitate the safe and free use of common areas of properties which are accessible to the public. Municipal legislation should be amended to reflect the need for greater public control of such places, through regulation of internal design features to promote diversity, concentration, intricacy and location as these terms are understood by planners.

Bar notices

The right to ban a visitor from publicly-used properties should be abolished. Bail or probation orders preventing a defendant from returning "to the scene of the crime", will remain available and are preferable in view of their judicial supervision. Alternatively, bar notices should be permitted only in narrow cases of specified, serious criminal misconduct. If the general bar notice is to be retained, it should be limited to a one day "cooling-off period" and specified forms of disruptive behaviour.

The delineation of publicly-used property

A specific delineation of publicly-used property should only be necessary under the second alternative legal regime. In this case, properties whose role and importance justifies the analogy to the "town square" should be so designated by the local authorities; other places such as most stores and restaurants, should then remain subject to the first legal regime, involving a requirement of specified cause.

The definition of "occupier"

The present T.P.A. should be amended to specify that where there is more than one occupier of the same premises (as frequently occurs in shopping malls and indeed residential buildings), and one of the occupiers gives express permission to enter the premises for a particular activity that is controlled by that occupier, no offence is committed, providing that the person confines his or her activities to the permitted one.

Public housing projects

Public housing projects differ from other residential premises in several respects: residential areas are often interspersed with privately-used spaces; there is frequently a lack of physical space in common

areas; and there has often been confusion over the boundary between public and private space.

The definition of "occupier" in the T.P.A. should make clear that a resident and a visitor have permission to make use of not only a private apartment, but the common areas of the facility which are designed for the use of all residents. Second, consideration should be given to landscaping and layout changes which make clear the delineation between public and private space. Third, greater resources must be devoted to the enforcement of the T.P.A. and the Criminal Code against "strangers" to public housing sites where unambiguously private space has been the scene of criminal acts such as drug trafficking, vandalism and assault.

Enforcement provisions of the T.P.A.

(A) Offence Notice

The Offence Notice under paragraph 3(2)(a) of the Provincial Offences Act should be amended so as to make clear that conviction can result in arrest and imprisonment, in the event of failure to pay the fine.

(B) Jail in lieu of fine

The alternative under the Provincial Offences Act of jail in lieu of fine payment should be amended so as to substitute the civil enforcement of fine payment under section 69 of the Provincial Offences Act.

Public education

Public education should be encouraged to promote understanding of the T.P.A. and its ability to fulfill or coincide with contemporary expectations concerning the rights of visitors on publicly-used property.

Youth services

Greater attention and resources must be devoted to the development of unconventional, loosely structured and outreach-oriented services such as the provision of drop-in centres and streetworker-delivered services tackling concerns such as counselling, employment and literacy.

SOMMAIRE ET RECOMMANDATIONS

Mandat

Notre groupe de travail, constitué le 23 juin 1986, avait pour mission d'examiner les plaintes adressées au Procureur général de l'Ontario concernant la Loi sur la violation du droit de propriété (ci-après appelée la "Loi") en ce qu'elle touche des lieux qu'utilise le public. On alléguait spécifiquement que les propriétaires de ces lieux appliquaient la Loi de façon trop restrictive et discriminatoire lorsqu'il s'agissait de jeunes personnes et de groupes minoritaires.

Aux fins du présent rapport, nous avons défini les "groupes cibles" comme étant: (1) les jeunes personnes de 12 à 25 ans; (2) les minorités visibles et les pauvres. L'expression "lieux qu'utilise le public" désigne des lieux auxquels le public a normalement accès, qu'il s'agisse de biens publics ou privés, et comprend les aires communes des mails et centres commerciaux, les installations de transport et terminus, les universités, les points d'intérêt public, comme les expositions, Ontario Place et les stades sportifs et parcs municipaux, les terrains de jeux, etc. Les magasins et les restaurants présentent, à des degrés divers, des attributs de lieux publics et privés. Les écoles et les hôtels sont des lieux "hybrides", si l'on peut dire, étant donné que, pendant la plus grande partie de l'année, le public

n'est habituellement pas admis dans les écoles, alors que la plus grande partie des hôtels est destinée à la location de chambres à des particuliers, non pas à l'usage du public.

Avant de préparer le présent rapport, nous avons mené des consultations intensives qui comprenaient, entre autres, des mémoires, des rencontres avec les groupes et experts intéressés, des demandes de renseignements officieuses, des visites sur place, et les principales recommandations ont fait l'objet de discussions avec un comité consultatif représentant les parties intéressées.

La Loi de 1980 sur la violation du droit de propriété

Le principe traditionnel de violation du droit de propriété dans la common law repose sur des notions absolues de propriété privée et de ses attributs, comme le droit d'en interdire l'entrée à autrui. Les deux derniers siècles d'industrialisation et d'autres changements sociaux ont contribué à accélérer les limites imposées aux droits relatifs à la propriété privée là où les intérêts publics et privés différaient quant à l'usage de ces biens. Vers le milieu des années 1970, la Cour suprême du Canada soumettait déjà les propriétaires à un principe d'obligation humanitaire générale envers les intrus qui se faisaient blesser.

Examinée dans un contexte de common law, la Loi comporte certains aspects déplorables. Elle n'a pas tenu compte des nouvelles tendances pour en arriver à un équilibre entre les différents intérêts sociaux en ce qui concerne des lieux destinés à l'usage du public. Au contraire, elle a cristallisé l'absolutisme de la common law en matière de droits de propriété privée en Ontario, empêchant ainsi toute évolution future. Tout comme ses prédécesseurs, la Loi ne fait aucune distinction entre les différents types de lieux et ne tient pas compte de la mesure d'utilisation publique des lieux. En vertu de la Loi, un mail commercial ne diffère en rien d'une maison privée, en ce sens qu'un droit général d'exclusion de tout visiteur vise les deux endroits, et que l'exercice de ce droit est légalement laissé au bon plaisir du propriétaire.

Possibilité d'abus

A première vue, la Loi crée une possibilité de mise en application trop restrictive et discriminatoire à l'endroit de groupes minoritaires et de jeunes personnes. L'occupant, le gérant ou le gardien de lieux qu'utilise le public peut demander à toute personne de quitter les lieux en tout temps, pour n'importe quelle raison, ou sans aucune raison du tout. Il peut le faire oralement ou par écrit. Si la personne ne quitte pas les lieux immédiatement, elle est passible d'une amende maximum de 1 000 $, et le responsable peut l'arrêter et la confier à la

garde d'un agent de police. Le défaut de payer l'amende peut entraîner une période d'emprisonnement aux termes de la Loi sur les infractions provinciales.

En outre, l'interdiction d'entrer n'est assujettie à aucune limite de temps. Par conséquent, à moins que l'occupant ne stipule volontairement la durée de "l'interdiction", le visiteur à qui on ordonne de quitter les lieux ne peut pas revenir plus tard dans la journée, le lendemain ou même l'année suivante.

Quant au moment et à la durée de l'expulsion, et à la façon d'expulser, l'occupant de lieux qu'utilise le public a un pouvoir discrétionnaire très large qui lui permet d'expulser n'importe quelle personne parmi la multitude d'individus qui se prévalent de l'invitation générale d'entrer dans de tels lieux. La Loi est particulière du fait qu'elle confère à des citoyens ordinaires - les propriétaires de lieux qu'utilise le public - le pouvoir important d'appliquer la Loi. La responsabilité d'interdire les comportements inacceptables par la société est en grande partie laissée à des personnes qui n'ont pas à répondre de leurs actes et n'ont pas non plus la formation nécessaire pour assumer ce rôle. En outre, il n'y a aucune disposition dans la Loi à l'effet qu'un visiteur doit avoir commis un acte ou un méfait manifeste qui le rende indésirable; le seul fait de se trouver dans les lieux est suffisant. L'occupant a le droit

d'exclure quelqu'un pour la simple raison qu'il s'agit de lieux privés. Ce pouvoir discrétionnaire quasi absolu est totalement incompatible avec le rôle et l'importance sociale des lieux qu'utilise le public, en particulier les centres commerciaux, dans la société ontarienne d'aujourd'hui.

Les perceptions du public

Étant donné que les gens ont le droit d'entrer librement dans les centres commerciaux, de marcher aux alentours, de converser entre eux et de rester dans les aires communes aussi longtemps qu'ils le désirent, tout comme ils le feraient sur une place publique, la vaste majorité de la population considère ces endroits comme des "biens publics" ou des "lieux publics". La plupart des individus et des représentants des jeunes et groupes minoritaires (les "groupes d'usagers") ont confirmé l'existence de cette perception, et la plupart des propriétaires et préposés à l'application de la Loi (les "groupes de propriétaires") l'ont aussi reconnue. Les corps policiers, les agents de sécurité et la Commission ontarienne des droits de la personne ont affirmé que la divergence entre la position légale et l'opinion publique constituait un problème sérieux, qui a pour effet de créer des tensions entre les préposés à l'application de la Loi et le public, et du ressentiment chez les groupes minoritaires et les jeunes.

L'importance et la responsabilité sociales

Les résultats des recherches confirment les témoignages présentés au groupe de travail sur les points suivants : il y a une pénurie d'installations communautaires convenables, particulièrement à l'intention des jeunes - pour se rencontrer, converser, "observer et être vu"; il s'agit de besoins essentiels, et il incombe principalement aux responsables de la planification urbaine et de l'aménagement du territoire de les satisfaire; les propriétaires des mails avaient de bonnes raisons commerciales en acceptant volontairement de jouer ce rôle. Le fait que, après le foyer et le lieu de travail ou l'école, c'est au centre commercial où le citoyen moyen passe le plus de temps, est révélateur du rôle important que jouent les centres commerciaux en ce qui concerne les interactions communautaires.

La "flânerie" n'est pas un problème en soi. Il s'agit d'un passe-temps sain et, en fait, nécessaire dans le monde d'aujourd'hui où les préoccupations familiales et le travail dominent de plus en plus la vie quotidienne. Dans l'ancienne société ontarienne, ainsi que dans plusieurs des pays d'origine des immigrants, la "flânerie" aux coins des rues et sur les places publiques constituait une participation indispensable et efficace à la vie sociale. Trop souvent, les banlieues ontariennes se sont développées sans que l'on prévoie des espaces publics et des installations sociales, et les mails sont devenus

par la force des choses des capitales des banlieues. Dans les centres-villes, les mails commerciaux ont littéralement déplacé et enclos les rues, les coins de rue et les centres commerciaux. À l'intérieur du mail et le long de ses rues fermées, on a ajouté la plupart des agréments reliés à la vie communautaire. En outre, il arrive fréquemment que des services essentiels ne se retrouvent nulle part autre dans le quartier que dans les centres commerciaux.

Les représentants des centres commerciaux ont mis en évidence le rôle que jouent ces installations en tant que centres communautaires, assumant des responsabilités communautaires envers les villes desservies. Il était donc important que ces endroits fassent partie intégrante de la collectivité autour d'eux, et qu'ils fournissent plus qu'une sélection de marchandises. Toutefois, les propriétaires de lieux qu'utilise le public n'ont pas suffisamment reconnu la nécessité de permettre au public d'en faire des usages non reliés directement ou indirectement à la rentabilité, qui est l'objectif principal. La privatisation de la place publique doit entraîner une obligation correspondante de permettre des "usages non productifs". Le respect de cette obligation doit être assuré par la reconnaissance juridique dans la Loi, de l'usage public de tels lieux privés, et les espaces destinés à l'usage du public doivent être conçus et construits en tenant compte de cette obligation.

Témoignages des groupes de propriétaires

Selon les dirigeants des groupes de propriétaires, la Loi contient un ensemble de mesures de plus en plus sévères pour faire face à un comportement offensant et, en l'absence d'un tel comportement, ces moyens ne sont jamais utilisés. La progression commence par une demande de ne plus se conduire de façon offensante, suivie d'une mise en garde, puis d'un avis de quitter les lieux; lorsque la personne revient ou récidive, il s'ensuit une arrestation et une poursuite. On a affirmé que les sanctions les plus sévères ne sont imposées qu'en dernier ressort, après que les autres mesures se sont révélées inefficaces. Ainsi, bien que la Loi confère un pouvoir discrétionnaire absolu d'exclusion, l'intention est qu'il ne soit utilisé que dans le cas où il y a comportement offensant identifiable qui dérange les activités dans les lieux qu'utilise le public. Dans la plupart des cas, les interdictions d'entrer dans les lieux ont été décernées sans limite de temps.

Les témoignages déposés pour le compte des centres commerciaux, des édifices à bureaux, de l'exposition nationale du Canada, des Blue Jays et des Argonauts de Toronto, de la Commission des transports en commun de Toronto, de l'Université de Toronto, de l'Hotel Security Chiefs' Association, du Conseil canadien du commerce de détail et des corps policiers démontrent que, selon les statistiques, le nombre de personnes accusées ou à

qui on a interdit l'entrée en vertu de la Loi ne représente qu'une infime proportion du nombre d'usagers de ces lieux.

Témoignages des groupes d'usagers

Plusieurs jeunes et membres de groupes minoritaires sont d'avis que l'on applique la Loi de façon discriminatoire à leur égard. Il semblerait que les rassemblements de groupes sont acceptables pour les personnes de race blanche, d'apparence normale ou de "classe moyenne", mais représentent une menace ou un dérangement lorsqu'il s'agit de jeunes, de membres de minorités visibles, de pauvres et, de façon générale, de personnes qui semblent mener un "genre de vie différent". Ces vues ont souvent pour effet de provoquer des confrontations entre visiteurs et gardiens. Le fait que les gardiens ne sont pas obligés de donner des raisons pour demander aux visiteurs de quitter les lieux, et refusent souvent de le faire, vient tendre encore davantage les relations. Leurs vues sont confirmées lorsque ce sont des agents de police qui appliquent la Loi au nom des propriétaires, étant donné qu'on les perçoit comme "prenant partie" ou "exécutant les ordres" des propriétaires privés au détriment de ces groupes d'usagers.

Des douzaines d'incidents, sur lesquels on a attiré l'attention du groupe de travail, viennent renforcer ces impressions. Presque tous les jeunes, ainsi que les groupes

représentant les jeunes et les minorités, ont mentionné des cas précis où des agents de sécurité, en particulier, se sont acharnés sur des personnes ou des groupes de ces catégories, leur ont demandé de circuler, les ont expulsés arbitrairement ou les ont arrêtés sans raison apparente. Dans certains cas, on a arrêté de fréquenter des mails commerciaux du centre-ville, malgré la pénurie d'autres endroits offrant des possibilités semblables. Un organisme de services à la jeunesse a estimé que 90 % de ses clients avaient été accusés de violation du droit de propriété à un moment quelconque.

Le Société d'aide à l'enfance de l'agglomération urbaine de Toronto et la Commission ontarienne des droits de la personne ont réalisé des sondages pour le groupe de travail, et d'autres témoignages ont été fournis par le Council on Race Relations and Policing, diverses cliniques juridiques communautaires, des écoles alternatives, des avocats qui ont représenté des défendeurs accusés en vertu de la Loi et plusieurs particuliers.

De l'avis de ces usagers, les propriétaires et leurs gardiens estiment que les groupes de "flâneurs" sont dangereux ou constituent des "bandes" en raison de leur jeunesse, de leurs vêtements ou de leur race. Les propriétaires de certains mails ont confirmé cette opinion. Certains croient eux-mêmes en ce "danger", alors que plusieurs autres ont déclaré que, bien qu'ils

ne soient pas de cet avis, c'est l'opinion de la majorité de leurs clients, et il y va de leurs intérêts commerciaux de protéger cette majorité contre de telles possibilités de désordre et de trouble afin de maintenir une atmosphère propice aux achats.

Conclusions tirées des témoignages

C'est ce dernier élément, c'est-à-dire les craintes et préférences de l'usager "moyen" des lieux qu'utilise le public, qui sert de lien pour expliquer les exposés apparemment irréconciliables des groupes de propriétaires et d'usagers. Les deux ensembles de représentations ne sont pas incompatibles; en fait, ils s'harmonisent assez bien.

Les deux exposés portent sur des événements différents. Les propriétaires décrivent les politiques et directives qu'ils donnent à leurs agents, et les usagers décrivent la façon dont la Loi est appliquée dans les lieux mêmes. Le pouvoir discrétionnaire quasi absolu conféré aux propriétaires est utilisé sur une base quotidienne en fonction du but principal, qui est celui de l'intérêt commercial personnel, et cet objectif est contrecarré par l'existence de désordres ou d'inconvénients, ou les menaces envers les usagers moyens qui forment la "majorité" du public. Étant donné que la Loi ne tolère aucune perturbation

d'une entreprise commerciale, il est donc inévitable que des situations qui ne sont pas vraiment dangereuses, ou qui devraient être tolérées par la société dans des lieux qu'utilise le public, constituent des motifs suffisants pour appliquer la Loi. De telles mesures visent surtout les personnes qui s'éloignent le plus du groupe majoritaire de par leur condition sociale, leur apparence ou leur comportement, c'est-à-dire les jeunes, les pauvres et les minorités visibles.

Les statistiques citées par les groupes de propriétaires ne contredisent pas la présente conclusion, étant donné que les chiffres avancés concernant l'usage de la Loi ne correspondent pas aux incidents décrits par les usagers. En vertu de la Loi, il n'y a pas d'obligation de noter une raison pour expulser ou poursuivre quelqu'un, seule la présence du visiteur dans les lieux étant nécessaire. Ainsi, une grande partie des statistiques se rapporte à la "flânerie" ou aux "activités suspectes", dans des circonstances où aucune infraction autre que la violation du droit de propriété n'est alléguée.

Les témoignages des groupes d'usagers sont anecdotiques, mais fiables. Il n'existe aucune compilation centrale de statistiques sur la fréquence et la nature de tels incidents, étant donné que "l'application trop restrictive ou discriminatoire" est un facteur non pertinent lorsqu'il s'agit de violation du droit de propriété. En outre, il est assez rare que

des membres de groupes minoritaires et des jeunes se servent des voies traditionnelles pour signaler des cas d'expulsion de lieux qu'utilise le public ou pour se plaindre relativement à de telles expulsions.

L'absence de politiques écrites et de directives de la haute direction au personnel préposé à la sécurité en ce qui concerne l'application de la Loi constitue l'un des principaux problèmes. Les directives semblent s'en tenir à l'image de l'entreprise et de la communauté et à la nécessité de garder le milieu sécuritaire et sous contrôle. Il est facile de voir dans ces objectifs l'exclusion non justifiée des "indésirables".

De plus, la formulation de politiques au niveau de l'entreprise a été négligeable. Ceci est encore une fois compréhensible, car la Loi n'en exige aucune et laisse ces décisions à la discrétion des gardiens. Par ailleurs, les gardiens ont soutenu sans équivoque que le propriétaire d'un mail ou d'un magasin a le droit d'expulser un groupe de personnes, qu'il dérange ou non, et qu'un gardien a le devoir de se rendre à ses désirs. Rien n'indique que les gardiens ont reçu une formation en matière de droits de la personne, de multiculturalisme ou de tolérance des divers modes de vie; encore une fois, la Loi n'exige rien en ce sens.

Conclusions

Le fait que la majorité des lieux qu'utilise le public faisant l'objet de la présente étude appartiennent à des particuliers n'est pas une conclusion en soi, mais plutôt un facteur à garder à l'esprit pour établir l'équilibre convenable entre les intérêts publics et privés qui doit sous-tendre toute modification de la loi.

Loin de diminuer les tensions, la Loi les aggrave. L'écart troublant qui existe entre les attentes de la collectivité et la Loi entraîne souvent des frustrations et des disputes verbales entre les visiteurs et les gardiens, les agents de police et les gérants. Le refus d'un visiteur de quitter les lieux et le refus d'un gardien de justifier sa demande mènent inévitablement à des confrontations physiques sous forme d'expulsions, d'arrestations et de détentions. Ainsi, des accusations de violation du droit de propriété sont souvent accompagnées ou remplacées par des accusations plus sérieuses, comme les voies de fait et l'entrave à la justice.

Le fait qu'il y ait apparemment des lacunes dans le système judiciaire, comme la charge énorme des cours criminelles, n'est pas une raison pour y substituer un système privé accessible seulement à ceux qui possèdent des biens.

À défaut d'une modification statutaire formelle, les différentes suggestions faites, comme la défense de modifier la Loi, l'invocation de la Charte ou le dépôt d'une plainte en vertu du Code des droits de la personne, ne serviraient qu'à enrayer les symptômes du problème et non sa cause, qui réside dans le pouvoir discrétionnaire sans limite d'expulser les visiteurs qui se trouvent dans des lieux qu'utilise le public.

RECOMMANDATIONS

Exiger une raison

Il faut restreindre le pouvoir discrétionnaire quasi absolu que possèdent les occupants de lieux qu'utilise le public en fournissant une définition suffisamment précise de la conduite répréhensible pour justifier l'expulsion d'un visiteur ou une poursuite judiciaire.

Un régime juridique visant des lieux qu'utilise le public

Il y a deux approches réalistes pour un régime juridique visant la violation du droit de propriété. Dans l'un ou l'autre cas, on doit soustraire les lieux qu'utilise le public au pouvoir discrétionnaire sans limite que confèrent les dispositions actuelles de la Loi.

(A) Interdiction d'usage manifestement incompatible

La première approche implique l'établissement d'une norme concernant la conduite répréhensible qui s'entend par "usage manifestement incompatible", et qui constituerait l'événement pouvant entraîner des sanctions aux termes de la Loi. Cette norme pourrait s'accompagner d'une énumération d'actes interdits, comme les voies de fait, le vandalisme, l'obstruction des voies d'accès des piétons et ainsi de suite. On devrait prévoir également des avis, sous forme de panneaux indicateurs, et encourager leur utilisation, bien que l'énumération d'actes par le propriétaire ne serait pas suffisante pour établir qu'il y a eu, en fait, conduite répréhensible. Ce serait au juge du procès d'évaluer la conduite répréhensible alléguée par l'occupant à la lumière des circonstances, comme la nature de l'acte commis, le moment où il a été commis et sa durée, le nombre de mises en garde, le genre d'usage public des lieux, la gravité du dérangement et les conséquences qu'en ont subies l'occupant et le public, les avis préalables par voie de panneaux indicateurs ou de billets.

Étant donné qu'il s'agirait d'une définition large de conduite répréhensible, il ne serait pas nécessaire de faire des distinctions subtiles entre les différents types de lieux qu'utilise le public. On pourrait les définir comme étant "des

lieux dans lesquels le public est normalement admis, qu'il s'agisse de propriété publique ou privée".

(B) L'analogie de la place publique

En vertu de cette deuxième solution, on exclurait les lieux qu'utilise le public des lois sur la violation du droit de propriété étant donné l'importance qu'ils ont acquise aujourd'hui et qui, du point de vue de l'intérêt public, leur donne le même rôle que jouaient les places et les marchés publics dans le passé.

Ce régime juridique garantirait que, durant les heures où le grand public est admis, les visiteurs seraient assujettis aux mêmes normes de conduite qui prévalent sur la place publique, c'est-à-dire la conduite d'un usager moyen qui est acceptable dans la société contemporaine.

La conduite des visiteurs serait régie par toutes les lois présentement en vigueur, y compris le Code criminel, les lois provinciales et les règlements municipaux. On devrait déléguer des pouvoirs aux autorités municipales afin qu'elles puissent adopter des règlements administratifs, comme on l'a fait pour la Commission des transports en commun de Toronto et l'Exposition nationale, et pour donner aux municipalités le contrôle des parcs publics et des rues.

Des régimes juridiques semblables se retrouvent présentement dans certaines lois des États américains. En outre, certaines parties de trois mails commerciaux de Toronto, Ottawa et Thunder Bay sont déjà assujetties à un régime qui ressemble en substance à la proposition de la place publique, et la ville de North York préconise cette approche pour ses installations du centre-ville.

Questions touchant la conception

Tout en les gardant sécuritaires, il serait possible de faciliter le libre usage des aires communes des endroits accessibles au public. Les lois municipales devraient être modifiées afin de mettre en évidence la nécessité de donner au public un plus grand contrôle de ces endroits, en réglementant la conception de certaines parties intérieures de façon à encourager la diversité, la concentration, la complexité et l'emplacement, selon que l'entendent les urbanistes.

Les avis d'interdiction

Le droit d'interdire à un visiteur d'entrer dans des lieux qu'utilise le public devrait être aboli. On garderait les dispositions touchant la caution et les ordonnances de probation pour empêcher qu'un défendeur retourne au "lieu du crime"; la surveillance judiciaire étant jugée un moyen préférable. Par

ailleurs, les avis d'interdiction ne devraient être permis que dans des cas particuliers, lorsqu'il s'agit de conduite criminelle grave. Si l'on devait continuer à utiliser l'avis d'interdiction général, il devrait être restreint à une "période de refroidissement" d'une journée et à des comportements désordonnés spécifiques.

Délimitation des lieux qu'utilise le public

La délimitation spécifique des lieux qu'utilise le public ne devrait être nécessaire que lorsque le deuxième régime juridique s'applique. Dans ce cas, les autorités municipales devraient désigner les lieux qui jouent un rôle suffisamment important dans la société pour justifier l'analogie de la "place publique". Les autres endroits, comme la plupart des magasins et restaurants, resteraient alors assujettis au premier régime juridique, qui exige une raison spécifique.

Définition du terme "occupant"

On devrait modifier la Loi actuelle afin qu'il y soit spécifié que, lorsque des lieux sont contrôlés par plusieurs occupants (comme c'est souvent le cas pour les mails commerciaux et, en fait, les immeubles d'habitation) et que l'un d'eux accorde une permission expresse d'y entrer pour une activité

particulière qu'il contrôle lui-même, une personne qui y entre ne commet aucune infraction pourvu qu'elle s'en tienne à l'activité permise.

Projets de logement public

Les secteurs de logement public diffèrent des autres lieux d'habitation à plusieurs égards : les aires résidentielles sont souvent entremêlées d'espaces réservés à l'usage des résidents, les aires communes sont souvent trop petites et la délimitation des espaces publics et privés est parfois difficile à établir.

Premièrement, dans sa définition du terme "occupant", la Loi devrait préciser clairement qu'un résident et un visiteur ont la permission d'utiliser, non seulement le logement lui-même, mais aussi les aires communes des installations destinées à l'usage de tous les résidents. Deuxièmement, on devrait songer à modifier l'aménagement paysager et l'agencement des lieux afin de délimiter clairement les espaces publics et privés. Troisièmement, on devrait appliquer la Loi et le Code criminel de façon plus énergique à l'endroit des "étrangers" qui se trouvent dans des secteurs de logement public et qui ont utilisé des espaces manifestement privés pour faire le trafic de drogues, commettre des actes de vandalisme et des voies de fait.

Application de la Loi

(A) Avis d'infraction

L'avis d'infraction aux termes de l'alinéa 3(2)a) de la Loi sur les infractions provinciales devrait être modifié afin d'y stipuler clairement que la personne qui se rend coupable d'une infraction et fait défaut de payer l'amende peut être arrêtée et incarcérée.

(B) Emprisonnement au lieu de l'amende

On devrait modifier la disposition de la Loi sur les infractions provinciales qui permet d'imposer une période d'emprisonnement au lieu du paiement d'une amende, pour soumettre le paiement de celle-ci à l'article 69 de cette loi, qui prévoit la perception des amendes par mesures civiles.

Sensibilisation du public

On devrait sensibiliser la population à la Loi sur la violation du droit de propriété et essayer de faire comprendre qu'elle peut répondre aux attentes contemporaines en ce qui a trait aux droits des visiteurs dans les lieux qu'utilise le public.

Services à la jeunesse

On doit songer à consacrer plus d'efforts et de ressources à l'élaboration de services non conventionnels, flexibles et orientés vers l'extérieur, comme la création de centres de rencontres, la mise en place de travailleurs qui iraient dans les rues pour distribuer des services en matière d'orientation, d'emploi et de formation.

CHAPTER ONE

INTRODUCTION, TERMS OF REFERENCE AND PROCEDURES

This Task Force was appointed on June 23, 1986 to investigate concerns which had been expressed to the Attorney General of Ontario regarding the law of trespass as it pertained to publicly-used property. Specifically, I was asked to examine the administration and enforcement of the Trespass to Property Act by occupiers of property to which the public ordinarily has access, and to report on allegations of unduly restrictive or discriminatory enforcement of the T.P.A. in its application to youth and minorities. A copy of the Terms of Reference of the Task Force is included as Appendix 1 to this report, and a copy of the Act is found at Appendix 2.

It is worthwhile to state at the outset some of the areas of application of the law of trespass which did not fall within the scope of my mandate, and which I have not attempted to address.

First, I make only bare reference and have not attempted any analysis of the difficult constitutional issues which arise from the interaction of private ownership, public use, and the exercise of fundamental freedoms such as freedom of religion, expression, assembly and association. Some of these

issues have, in any event, arisen in cases which are now before the courts.

The second area of exclusion arises from the specification of two "target groups" whose allegations concerning the use (and alleged misuse) of the law of trespass led to the appointment of this Task Force: youth and minorities. My study is not concerned with the application of the law of trespass, including the Act, in the abstract; nor is it concerned with the collision of property rights and public activities such as union organizing, picketing, religious proselytizing and leafletting. While everyone can define himself or herself as a member of a minority group, the Terms of Reference were not drafted to include everyone. From the input which I received through the consultation process described below, I have broadly defined the target groups as (1) young people between the ages of 12 and 25, and (2) visible minorities and the poor.

Third, the Terms of Reference of this Task Force exclude property to which the public does not customarily have access: for example, private homes, apartments, condominiums, farms, private beaches, and gravel pits. While the dividing line between "publicly-used" and "privately-used" property is undoubtedly an elusive one, it is undisputed that there are certain types of privately-used property which must carry with them the traditional notions of absolute dominion and unfettered right of exclusion embodied in

the Trespass to Property Act, and I have not challenged this assumption in any way.

Moreover, it is worth noting at an early stage that for purposes of this Task Force, the relevant distinction is between public and private use, and not between public and private ownership. The two terms are by no means co-extensive. Some privately-owned properties (such as shopping plazas) are among the most prominent examples of public use. Conversely, despite the fact that each member of the population owns a notional proportion of Ontario Housing Corporation projects, most of the buildings comprising such properties are, and must be, entirely closed to the general public. Residents of publicly-assisted housing deserve no lesser degree of privacy than their counterparts in privately-owned residential settings.

Thus defined, publicly-used property can be seen in such examples as the common areas of shopping malls and plazas, transportation facilities and terminals including subways, buses and trains, universities, public attractions such as the Exhibition, Ontario Place and sports stadiums and municipal parks, playgrounds and plazas. In all of these cases, interspersed among publicly-used land or buildings are found private premises such as offices or restricted areas.

In varying degrees, stores and restaurants display attributes of both publicly- and privately-used property. While the public is customarily admitted and indeed attracted to such locations, most stores and restaurants do not have significant areas devoted to open public use and accepted usage commonly demands a degree of privacy.

Two types of "hybrid" properties merit special attention: schools and hotels. Although usually publicly-owned, school properties are uniquely "private" in most of their activities in that they must provide a protective environment which is conducive to the sensitive task of instruction and learning.

Moreover, while students are in attendance at a public or private school, it is the duty of the principal, pursuant to the Education Act:

> (a) to register pupils and to register their attendance,
>
> (b) to give assiduous attention to the health and comfort of the pupils ... and to the care of all teaching materials and other school property, and
>
> (c) to refuse to admit to the school or classroom a person whose presence in the school or classroom would in his judgment be detrimental to the physical or mental well-being of the pupils.

To this end, many school boards have designed public notices which are displayed prominently near entrances to school property in order to convey the restricted

nature of the school grounds and the limited scope of entry.

School premises, however, have a multi-faceted character, since they also function as community centres involving members of the public in the education process and as neighbourhood attractions for recreation and socialization. In these capacities, most frequently during the summer months, they take on public use and come within the scope of this Task Force.

Hotel premises vary in their public usage depending on their components and their design characteristics. Guest rooms and the adjacent halls provide private accommodation and are not intended to be freely accessible to the public. The common areas, on the other hand, are frequently thoroughfares to public transportation or shopping facilities, and indeed hotel lobbies in large cities often form part of the downtown shopping core. In these situations, they are typical examples of privately-owned properties to which the public is attracted and freely enters.

The Consultation Process

Following my appointment, I sent letters in early July 1986 inviting written submissions by September 15, 1986 from about 100 "affected groups", including shopping centre owners, managers and associations, retail store owners and associations,

security firms, managers of public housing and other affected properties, municipalities, police chiefs, legal clinics, children's aid societies and other child representatives, and groups representing ethnic minorities.

Beginning on July 4, 1986, advertisements inviting written submissions by September 15 were placed in Ontario's major daily newspapers and the Ontario Reports, and similar advertisements appeared later in about 75 ethnic community publications. Many of the respondents to the initial advertisements and correspondence pointed me toward other interested groups, who then received similar invitations.

In all, I received about 75 written submissions, most of them by September 30, 1986. In addition to the groups described above, I received helpful input from a number of individuals who described personal experiences, lawyers who related their clients' concerns and university professors and students in such fields as law, criminology, architecture, urban planning and social work. I also heard from some members of the federal and Ontario legislatures. A list of the written submissions which I received is included as Appendix 3.

Between October, 1986 and January, 1987, I conducted about fifty interviews in Toronto and Ottawa and at McGill University in Montreal. I have listed the participants in these meetings in Appendix 4. The

meetings in Toronto were held for the most part at the Task Force offices, but included visits to schools, community centres, shopping centres and public housing sites, as well as a police guided tour of the Jane-Finch area of 31 Division in Metropolitan Toronto.

Following the drafting of this report, but before submission to the Attorney General, I appointed an Advisory Committee to represent the various interested parties who participated in the consultative process. The members of the Advisory Committee are listed at Appendix 5. We met on February 27, 1987 to discuss the major recommendations which I had forumulated by then. I invited further input prior to completion of the report, and I received several additional submissions the following week.

Positions of the parties

From this cast of characters, a sharp dichotomy emerged. With minor exceptions, the submissions were arrayed into two camps. The owners, developers and managers of publicly-used property, as well as police forces and security firms, uniformly praised the operation of the present trespass laws. They cautioned against any dilution of the apparently absolute discretion conferred upon an occupier of property under the common law and the T.P.A. to exclude anyone from such property at any time, for an unlimited length of time, and for any reason or no reason. The

property owners, whom I shall refer to from time to time as the "owner groups", reported that they had no knowledge of arbitrary or discriminatory enforcement of the Trespass to Property Act against youth and minorities, and maintained that in total, the number of persons excluded from publicly-used property using the mechanisms of the Act represented a minute proportion of the total traffic in such properties.

The groups representing youth and visible minorities and most representatives of other members of the public were positioned at the opposite extreme. They submitted that it was incompatible with the important social and economic role which publicly-used properties play in contemporary Ontario society to permit the occupiers of such properties to extend an apparent general invitation to the public, yet be permitted to withdraw that invitation in individual cases in the absence of misbehaviour by such individuals. Some groups with whom I met went further, advocating that publicly-used property should be governed by the same legal regime as public streets and sidewalks; that is, that there be free public access, and that the conduct of visitors be regulated by the general law, without any right of exclusion at all.

These "user groups" claimed that there is a widespread perception that members of the public whose clothing or physical appearance is "unusual" in some way are singled out and told to move on, or at times,

excluded or prosecuted, in situations in which more "conventional-looking" people are not disturbed. In short, there was a common perception of arbitrary treatment and discrimination against youth and visible minorities, and many examples of such treatment were given. Moreover, the user groups submitted that problems arose, in part, because of the public understanding that property to which it ordinarily has access is covered by a different, less controlled regime than what is loosely referred to as "private property".

CHAPTER TWO

THE DEVELOPING COMMON LAW OF TRESPASS TO PROPERTY

The definition of trespass to property

From its earliest days, the common law protected the rights of possession of property owners against unauthorized entry through the remedy of a trespass action. It is noteworthy that in its original formulation, the law of trespass was designed as a behavioural control, to prevent breaches of the public peace, and only later did it take on the role of protection of property and invasion of one's privacy. As Professor Fleming states:

> In the course of its history, the action of trespass came to be used for a number of different purposes which have left their mark on its conditions of liability. In origin, trespass was a remedy for forcible breach of the King's peace, aimed against acts of intentional aggression. This early association with the maintenance of public order explains why the action lies only for interference with an occupier's actual possession. Its proprietary aspect became more dominant when it was later used for the purpose of settling boundary disputes, quieting title and preventing the acquisition of easements by prescriptive user. These latter functions account for the rule that the plaintiff is not required to prove material loss, and that a mistaken belief by the defendant that the land was his affords no excuse.[1]

By the 18th century, then, trespass connoted any intentional intrusion on land. The American Law

1. Fleming, The Law of Torts (6th ed., 1983), p. 440.

Institute Restatement of the Law of Torts defined liability in the following terms:

> 158. Liability for Intentional Intrusions on Land
>
> One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally
>
> (a) enters land in the possession of the other, or causes a thing or a third person to do so, or
>
> (b) remains on the land ....

For these purposes, "intrusion" simply indicated the fact that the possessor's interest and the exclusive possession of land had been invaded by the presence of a person or thing upon it without the possessor's consent.

Changing conceptions of property

This straightforward definition of trespass was bolstered by a similarly unambiguous concept of property itself. The common law notion of property was described in Blackstone's Commentaries, published in 1765, as absolute dominion over things. In Blackstone's words, property was "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe". Thus, the definition of property contained two elements: (1) the physicalist conception of property, which required that "some external thing" serve as the object of property

rights (and thereby divided all legal rights into two categories, rights over persons and rights over things); and (2) the absolutist conception, according to which property was "an absolute right, inherent in every Englishman". According to Blackstone, the law prevented the smallest infringement of property rights, even for the good of the entire community.[2].

Professor Risk records similar legal expectations in his description of property rights in 19th century Ontario:

> The grants made by the Crown were grants of a fee simple estate, which was ownership in the usual sense. Tradition, the expectations of the inhabitants, and the limited alternatives offered by the settled common law of property made its use a simple and instinctive choice. It was a power that endured indefinitely and could be transferred, to possess and determine use, and to create lesser estates, interests, and restrictions. The consequence was comprehensive private power to determine the use and ownership of the land ....
>
> This law about the use and transfer of land can be perceived as a record of values. The dominant and pervasive value it expressed was individual autonomy, and especially individual power and initiative. Like the values expressed by the law about the market, this value was implicit in the general nature of this law: it was a grand and extensive private power.[3]

Over time, the industrialization and increasing complexity of commercial and social

2. J. Vandevelde, The New Property of the Nineteenth Century: The Development of the Modern Concept of Property, 29 Buff. L. Rev. 325 (1980) at pp. 328-32.

3. R.C.B. Risk, The Last Golden Age: Property and the Allocation of Losses in Ontario in the Nineteenth Century (1977), 27 U.T.L.J. 199, at pp. 202 and 213-14.

relationships required qualifications on the physicalist and absolutist conceptions of property. The new property extended beyond rights over things and included any valuable right. More importantly for present purposes, the new property "consisted not of an absolute or fixed constellation of rights, but of a set of rights which were limited according to the situation".[4]

The unquestioning faith in individual power as a means of achieving change and material progress for society as a whole was gradually eroded as public and individual interests began to diverge. An early example of this divergence was the obvious inability to accord "absolute dominion" to each of several neighbouring property owners fronting on a common river where the activity of one owner had detrimental consequences for others downstream and for the region as a whole. Balancing tests and "reasonable use" doctrines were adopted by courts and legislatures: increasingly sophisticated provincial and municipal limitations were placed upon the uncontrolled use of private property.

The common law of occupiers' liability

A similar evolution has taken place in the area of occupiers' liability to persons injured on

4. Vandevelde, supra, p. 357; M.J. Horwitz, The Transformation of American Law 1780-1860 (1977), at pp. 31-62; C. Reich, The New Property, 73 Yale L.J. 733 (1964); International News Service v. Associated Press, (1918) 248 U.S. 215.

private property. Professor Fleming describes the process as follows:

> Until well into the midst of the nineteenth century, the prominent social value attached to landholding defied all serious challenge to the claim by occupiers to untrammelled use and enjoyment of their domain with least subordination to the interests of others. Qualified only by such concern for neighbours as was exacted by the law of nuisance and trespass, the landowner was virtually immune to demands for the safety of persons who came upon his land, except not to injure them wilfully, set traps or use excessive force in expelling trespassers. With respect to the condition of the premises, even a lawful visitor entered for all practical purposes at his own risk. Only belatedly and after protracted judicial groping did this special tenderness for a sectional interest group begin to yield to the combined thrust of industrialization, with its attendent proliferation of physical dangers, and a growing sense of social responsibility.[5]

Thus, the English common law which was adopted in this jurisdiction rested occupiers' liability on an abstract system of categorizations of entrants which paid no attention to the conduct of the occupiers or the nature of their premises. An "invitee", defined as "a lawful visitor from whose visit the occupier of land stands to derive an economic advantage", was accorded the highest standard of care: an occupier must use reasonable care to prevent damage to an invitee from unusual dangers of which the occupier knew or ought to know. The intermediate category of "licensee" referred to a person such as a house guest who entered on the occupier's land with permission but without conferral of

5. Fleming, supra, p. 440.

economic advantage; such an individual was entitled to be warned of concealed dangers which were known to the occupier, but no duty arose with respect to obvious dangers. The third category of "trespasser" encompassed persons who entered land without the occupier's permission, whether or not that lack of permission was known to the entrant. An occupier was found liable to a trespasser for injuries only if the occupier created a danger with a deliberate intent of doing harm or damage to the entrant or wilfully acted with reckless disregard of the entrant's presence.

Recent decisions by the highest courts in Canada and the United Kingdom have mitigated the harshness of the category doctrine through a dilution of the absolutist scope of property rights. For example, the courts found that an individual was an invitee rather than a licensee in situations where there was no direct economic advantage to the occupier. To minimize the hardship of the trespasser rule, especially in the case of children, the courts invented the legal fiction of an "implied license" where an entrant was encouraged to come on to the land by some attraction.

In British Railways Board v. Herrington[7], the House of Lords had to determine whether a six year old boy who was injured when he wandered into the path of an

6. Fleming, supra, p. 416.

7. [1972] 1 All E.R. 749.

oncoming train was owed a duty of care by the railway. The court decided that regardless of his status as a trespasser, the Railway Board owed him a duty of reasonable care which had not been discharged. The Board should have recognized the allure that its property would have to a young boy and should have taken steps to prevent injury to such persons on its land. In the course of his judgment, Lord Reid said, "legal principles alone cannot solve the problem". Professor Fleming has recognized the need for change "in the unstinting support" given to property owners by the law of trespass: modern conveniences "pose particular temptation and risk to children, especially from poor neighbourhoods, who lack adequate parental supervision and often safe playgrounds".[8]

In 1974, the Supreme Court of Canada enunciated a "duty of ordinary humanity" to a trespassing snowmobile operator. In Veinot v. Kerr-Addison Mines Ltd., Mr. Justice Dickson applied that standard as follows:

> Even if Mr. Veinot is regarded as a trespasser his appeal to this Court should succeed. If he was a trespasser, the inquiry must be as to whether his presence on the ploughed road could reasonably have been anticipated for, if so, the company owed him a duty and that duty was to treat him with ordinary humanity.
>
> Although as a general rule a person is not bound to anticipate the presence of intruders on private property or to guard them from injury, a duty may arise if the owner of land knew of, or from all the surrounding circumstances ought reasonably to have foreseen, the presence of a trespasser.[9]

8. Fleming, supra, p. 440.

9. (1974) 51 D.L.R. (3d) 533, at p. 554.

Although the judicial tendency in common law jurisdictions has been to assimilate the standards of care in the three categories to a single requirement of reasonableness given all the circumstances, it is significant for present purposes that the Australian courts have sanctioned a new category for visitors who enter "as of right".[10] These persons are unlike the conventional type of visitor, in that their title to enter does not derive from a privilege which the occupier is free to withhold or confer without limitation. In particular, they differ from licensees because they do not gain admittance by grace, and from invitees because their presence does not confer an economic benefit on the occupier. For lawful users of facilities open to the public, the weight of Australian authority accords the same measure of protection as to invitees.[11]

In contrast, however, members of the public resorting to public parks, libraries and other conveniences were classified by English courts as mere licensees, although Professor Fleming concludes that the standard of care accorded such public entrants became almost indistinguishable from that due to invitees.[12]

10. See Paton, Those Who Enter As of Right (1941) 19 C.B.R. 1; Entry As of Right (1941) 24 A.L.J. 47; Wallis-Jones, Public Authorities as Occupiers (1949) 65 L.Q.R. 367.

11. Fleming, supra, p. 428.

12. Fleming, supra, p. 428.

The Occupiers' Liability Act, 1980

Judicial liberalization of the rights of visitors was overtaken by legislative change in many jurisdictions, including Ontario. Recommendations by the Ontario Law Reform Commission in January 1972 to abolish the categories of entrants took the same approach as the Scottish Occupiers' Liability Act of 1960. This approach was followed by the Uniform Law Conference of Canada in 1972 and the Province of British Columbia in 1974. Yet the Attorney General's Discussion Paper on Occupiers' Liability and Trespass to Property of May, 1979, while asserting that "the enactment of a common duty of care is a prerequisite to any real reform in this area of the law", was aimed in large part at the protection of "benevolent" rural occupiers who permitted recreational activities on private lands. In line with this concern, the proposed Act removed the general standard of reasonable care and imposed only the "trespasser obligation" on the occupier not to deliberately or recklessly cause harm to the visitor in a variety of newly categorized situations relating to recreational use of rural premises. Moreover, the lowered standard of conduct for occupiers was not limited to trespassers in the common law sense, and included many common law licensees on rural lands.

The Occupiers' Liability Act was given first reading on December 11, 1979 in essentially the same

form as the draft bill attached to the Attorney General's Discussion Paper. This was in spite of the detailed criticisms by academic commentators and others concerning the substitution of statutory categories of entrants for the prior common law classifications, as well as the perceived regression from the progressive standards of conduct toward trespassers which the Supreme Court of Canada had struggled to reach in Veinot and Mitchell v. C.N.R.[13]

These criticisms were voiced by members during the debates on second reading on December 18 and 19, 1979 and on third reading on May 13, 1980. One member, for example, quoted extensively from the Veinot and Harrington decisions, and cited Mr. Justice Dickson's description of the attitude toward trespassers which was abandoned in those cases:

> [The common law] rules, of course, perpetuated the traditional 19th century concern for the sanctity of landed property. The general principle was that a landowner could do as he wished with his land. He owed no duty to an intruder, however accidental or inadvertent the intrusion, other than to refrain from shooting him or otherwise recklessly and wantonly doing him harm.[14]

It was also noted during debate that the former "trespasser" standard of care would apply not only in rural settings, but on urban premises, wherever

13. [1975] 1 S.C.R. 592.

14. Hansard, Legislature of Ontario, December 18, 1979, p. 5692.

"risk" could be deemed to have been "willingly assumed by the person who enters on the premises.", and that this provision could have major application to children in built-up commerical or industrial establishments.

In spite of these objections, Bill 202 passed third reading on May 20, 1980 and was proclaimed in force on September 8, 1980.

In many ways, the T.P.A. experienced a similar history to the Occupiers' Liability Act. Indeed, the two bills were coupled together from the outset, with the release of the Attorney General's Discussion Paper, and they were considered together by the Legislature and the Standing Committee on Resource Development. In both cases, the dominant motivation for reform was protection of the interests of rural landowners. And in both cases, because of this relatively specialized concern, comparatively little attention appears to have been paid to significant developments in the common law's protection of public entrants to private property. For in the case of trespass as well as occupiers' liability, a significant evolution had occurred, and the effect of the Trespass to Property Act, which was also proclaimed in force on September 8, 1980, was to "freeze" the common law in its developing state, without adequate recognition of the limitations on control of private property which were widely perceived as necessary by this time.

The legislative and judicial incursions on the absolutist conception of private property which I outlined earlier have continued at an accelerated pace in the decades preceding enactment of the T.P.A. At the legislative level, Blackstone's notion of property ownership, with its inherent qualities of total dominion, has long been superceded by increasingly sophisticated and pervasive forms of regulation by the federal, provincial and municipal governments. Ownership and control of properties is subject to such obvious publicly-imposed limitations as the Criminal Code; quasi-criminal laws of various types; and numerous statutes and municipal by-laws governing public health and safety as well as the planning, orderly development and construction of privately-owned buildings. Particularly at the municipal level, the detailed regulation of the manner, location, timing, sequence and content of proposed development (with which many of the parties to this Task Force are all too familiar) has imposed a significant overlay of public interest on the construction of any large-scale "private" development.

The common law of trespass to property

Judicial decisions during the two decades prior to the T.P.A. on issues of trespass to publicly-used property were not uniform, but indicated a general move toward recognition of competing social interests in the use of such property.

In Regina v. Peters[15], the defendant was picketing on a sidewalk in front of a Safeway store at the Shopper's World Plaza in the town of Brampton. The picketing was proceeding in a peaceful and orderly manner, without any obstruction of passers-by, and was intended to protest the sale of California grapes at the Safeway store. The Ontario Court of Appeal held that the owner of a store in a shopping plaza who had granted a right of entry to a particular class of the public had not thereby relinquished its right to withdraw the invitation to the general public or to any particular person. If a member of the public whose invitation had been withdrawn chose not to leave, he became a trespasser and could be prosecuted under the Petty Trespass Act.

On appeal to the Supreme Court of Canada[16], two questions were framed for the consideration of the court. One question concerned the constitutional validity of the Petty Trespass Act, and the other was as follows:

> Did the learned Judges in Appeal err in law in determining that the owner of the property had sufficient possession of the shopping plaza to be capable of availing itself of the remedy for trespass under the Petty Trespass Act, RSO 1960 Chapter 294, Section 1(1)[16]

15. [1971] 1 O.R. 598.

16. (1971) 17 D.L.R. (3d) 128n.

The Supreme Court in a brief endorsement, dismissed the appeal, stating only that the two questions should be answered in the negative, and neither adopting nor repudiating the reasons of the Court of Appeal.

In Regina v. Page[17], the defendant had been asked to leave the Hopedale Shopping Centre in Oakville. He left when first asked, but returned later the same day and was charged with trespass on the second visit. The Ontario High Court held that a shopping plaza, even though extensive in area, was still private property and the landlord could invoke the provisions of the Petty Trespass Act to prevent persons loitering on the premises who were using the premises for no purpose connected with the shopping plaza. After notice, the landlord could cause the removal and arrest of such persons.

Thus, by the 1970's, it appeared that the Ontario courts had adopted a strict view of the law of trespass, holding that in spite of the public and open nature of shopping plazas, they remained in essence private property from which anyone may be excluded at the discretion of the owner of the lands, regardless of the conduct of the person sought to be removed. In reaching this position, it appeared that the courts were influenced by the "worst case" scenario outlined by Mr. Justice Haines in Regina v. Page at pp. 294-95:

17. (1965) 3 C.C.C. 293

> The case raises questions of importance to all those operating shopping plazas and those who wish to use them especially during the hours of day and night when the shops in the plaza are closed, or only a few, such as restaurants remain open. Adolescents and others find the large expanses of asphalt and broad avenues attractive for a multitude of purposes, some of which are quite innocent, and others suspect. Many teenagers in the habit of meeting on the streets where the police have available a wide variety of laws to assist them, have moved to the shopping plazas where the police find themselves restricted by the laws pertaining to conduct on private property. The operators of the shopping plaza may discover that the areas set aside for the use of customers of the shops are being used by a wide variety of people for a multitude of purposes in no way related to the business of the plazas. Indeed, some people having resort to these areas may play games, engage in automobile, motorcycle or bicycle races, act in a rowdy manner, and even congregate with a view to causing embarrassment to those having legitimate business on the premises. To the operator of the plaza and his tenants, these unwarranted visitors may well be a nuisance. As a landlord, the operator may find his tenants demanding that he take appropriate measures to abate the nuisance by keeping the areas under his control free of undesirable people and those whose conduct form a detriment to the business of the shopkeepers. It is not difficult to understand how shopkeepers whose windows may be broken, whose goods are stolen, whose customers are harried by exuberant or discourteous persons looking to their landlord for protection, and in turn the landlord taking whatever means are available to him to keep undesirable people from the premises at times when their presence can have no connection with business conducted thereon by the tenants.[18]

An alternative point of view can be found in judicial decisions during the same time period from Western Canada. In Zeller's (Western) Ltd. v. Retail Food & Drug Clerks' Union[19], four individuals picketed Zeller's by walking back and forth on the sidewalk in front of the store, over which Zeller's had a right of

18. (1965) 3 C.C.C. 293, at p. 294.

19. (1953) 42 D.L.R. (2d) 582 (B.C.C.A.)

way. They carried sandwich boards bearing the statements: "Support Our Strike, Don't Shop at Zeller's." The pickets handed out pamphlets to those who requested them, and did not interfere with passers-by. Zeller's brought an application for an injunction against this picketing, and the trial court's dismissal of the application was upheld by the British Columbia Court of Appeal.

In Grosvenor Park Shopping Centre Ltd. v. Waloshin[20], employees of Loblaws Groceterias were on strike and picketed the Loblaws store in the Grosvenor Park Shopping Centre. The store obtained an injunction restraining the picketing, and this order was appealed. The Saskatchewan Court of Appeal held that a landlord of a shopping centre in which various premises were leased to tenants, together with easements over the adjacent sidewalks and parking lots, and to which the public had an unrestricted invitation to enter, did not have actual possession of the land in question, and accordingly could not maintain an action for an injunction based on trespass to prevent picketing directed at one of the tenants.

In Regina v. Carswell[21], a lawful strike was in progress against Dominion Stores, which occupied premises at the Polo Park Shopping Centre in Winnipeg. Sophie Carswell, a striking employee, was picketing in a

20. (1964) 46 D.L.R. (2d) 750 (Sask. C.A.).

21. (1974) 48 D.L.R. (3d) 137 (Man. C.A.)

peaceful manner on the sidewalk adjacent to the front of the store. The manager asked her to leave; she refused and was charged under the Manitoba's Petty Trespass Act. On appeal from her conviction at trial, the Manitoba Court of Appeal weighed the conflict between the property interest of the landlord-owner in the sidewalk and the statutory right of the employee to engage in peaceful picketing in the course of a lawful strike, and decided that considerations of both policy and good sense dictated that the latter should prevail.

The policy foundation which was reflected in the Western courts' application of the trespass statutes contained the following elements:

(A) The common areas of shopping malls were to be treated similarly to public sidewalks which were available for lawful demonstrations. In the Zeller's decision, Mr. Justice Davey stated:

> It is clear from Williams v. Aristocratic Restaurants (1947) Ltd.[22], that if the pickets had been on a public street the appellants' conduct would not have constituted a nuisance. I have difficulty in understanding how, on the material before us, conduct that would have been lawful upon a public sidewalk and so within the saving clause of the injunction, became unlawful and in breach of the injunction because it occurred on a private sidewalk over which the respondent had an easement appurtenant to the store that was being picketed. I can see no essential difference between a public road and respondant's private easement that could produce that change in the legal result.[23]

22. (1951) 3 D.L.R. 769 (S.C.C.)

23. (1963) 42 D.L.R. (2d) 582 at pp. 585-86.

(B) As a result, some of the privileges normally associated with absolute ownership of private property were inapplicable in the context of a shopping plaza. In his reasons for judgment in Carswell, Freedman C.J.M. described the nature of a shopping centre:

> The issue arising on this appeal concerns the right of peaceful picketing at a shopping centre in the course of a lawful strike. The picketing took place on a sidewalk adjacent to the premises of the struck employer. Title to the sidewalk area is vested in the owner of the shopping centre. In that sense the picketing took place on private property. But this is private property with a difference for we are dealing here with a shopping centre, and as is well known the sidewalks, parking lots, malls, roadways and similar areas of a shopping centre are generally open to public use. Indeed, every shopping centre operates on the principle that a continuing invitation to the public has been extended to resort to it. That does not mean that it has ceased to be private property. It does mean that the exercise of the rights ordinarily incident to private property may have to be treated as qualified, depending on the particular situation that has arisen.[24]

Freedman C.J.M. quoted with approval from decisions of two appellate courts in the United States. In a 1964 decision raising the same issue, albeit in a constitutional context, a unanimous Supreme Court of California had stated:

> The problem presented in this case is one of accommodating conflicting interests: plaintiff's assertion of its right to exclusive use of the shopping center premises to which the public in general has been invited as against the union's right of communication of its position, which it

24. (1974) 48 D.L.R. (3d) 137 at p. 138.

> asserts, rests upon public policy and constitutional protection .... We conclude that the picketing in the present case cannot be adjudged in the terms of absolute property rights; it must be considered as part of the law of labor relations, and a balance cast between the opposing interests of the union and the lessor of the shopping center.[25]

In Marsh v. State of Alabama, a 1946 decision of the United States Supreme Court, Mr. Justice Black stated:

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.[26]

The mounting pressure to resolve the conflicting decisions in the Canadian "shopping centre cases" culminated in the appeal of Sophie Carswell's acquittal to the Supreme Court of Canada. A sharply divided court allowed the appeal by a vote of six to three, thereby restoring the conviction under the Petty Trespass Act. The opposing opinions were filed by the then and present Chief Justices.

25. Schwartz-Torrance Investment Corp. v. Bakery & Confectionary Workers' Union (1964) 394 P.2d 921 at pp. 922 and 926.

26.(1946) 326 U.S. 501, at page 506. See also Amalgamated Food Employees Union v. Logan Valley Plaza, Inc. (1968) 391 U.S. 308; Lloyd's Corporation, Ltd. v. Tanner (1972) 407 U.S. 551; Hudgens v. N.L.R.B. (1976) 424 U.S. 507; Robins v. Pruneyard Shopping Center (1979) 592 P. 2d 341 (Cal. Sup. Ct.), affd. (1980) 447 U.S. 74 (S. Ct.)

Chief Justice Laskin agreed with the reasons of Freedman C.J.M., and refused to accept the argument that the issue before the Court had been resolved by its brief endorsement in Peters four years earlier. The Chief Justice reasoned that unlike the Peters case, in which an abstract legal proposition had been affirmed, the Carswell case demanded a weighing of competing interests between the shopping centre owner and the picketer.

Thus framed, the dialogue between Laskin C.J.C. and Dickson J. rested on two issues involving the appropriateness of deference by the Court: first, whether the Court must follow the Peters decision; and second, whether the balancing of social considerations was an appropriate role for the Court to undertake under its common law jurisdiction, or whether that weighing must be left to the Legislature. To the majority, deference was appropriate on both counts; for the minority, deference was proper in neither case.

Accordingly, Mr. Justice Dickson concluded that the Court's recent and unanimous judgment in Peters must be followed and that the common law right of a property owner to exclude others must prevail until reversed by legislative proscription. Given his description of the proper limits of the judicial function under the common law, it was of course unnecessary for Mr. Justice Dickson to comment on the appropriateness of legislative change to limit the

property owner's right of exclusion. He noted, however, the 1973 British Columbia Labour Code, which effected precisely the result sought by Ms. Carswell by exempting picketing under that statute from liability for trespass to property to which a member of the public ordinarily had access.

The Chief Justice, on the other hand, was required to pursue his thesis of limited property rights much more directly. And while the majority of his colleagues were unable to accept his views as the prevailing legal position, the reasons of the Chief Justice provide a powerful foundation on which to mount the case for legislative reform of the law of trespass.

The Chief Justice first described the typical shopping centre, one of the most prominent examples of publicly-used property today:

> The shopping centre has the usual public amenities, such as access roads, parking lots and sidewalks, which are open for use by members of the public who may or may not be buyers at the time they come to the shopping centre. There can be no doubt that at least where a shopping centre is really accessible to the public ... the private owner has invested members of the public with the right of entry during the business hours of his tenants and with a right to remain there subject to lawful behaviour.[27]

Referring to the status of the shopping centre visitor as a licensee, his Lordship said:

27. Harrison v. Carswell, (1975) 62 D.L.R. (3d) 68 at pp. 69-70.

> Counsel for the appellant owner in this case stated that members of the public entered and remained in the shopping centre at the owner's whim under what may be called a revocable license, and were subject to liability for trespass if they did not leave when requested, regardless of how proper their conduct was at the time. This is an extravagant position.[28]

Later on in his judgment, the Chief Justice described in vivid terms the distinction which must be drawn between a private home and a publicly-used facility on the basis of the privacy interest which is implicated in each case:

> Trespass in its civil law sense, and its penal sense too, connote unjustified invasion of another's possession. Where a dwelling-house is concerned, the privacy associated with that kind of land-holding makes any unjustified or unprivileged entry a trespass, technically so even if no damage occurs .... In short ... there is a significant element of protection of privacy in resort to trespass to exclude or remove persons from private dwellings.
>
> The considerations which underlie the protection of private residences cannot apply to the same degree to a shopping centre in respect of its parking areas, roads and sidewalks. Those amenities are closer in character to public roads and sidewalks than to a private dwelling. All that can be urged from a theoretical point of view to assimilate them to private dwellings is to urge that if property is privately owned, no matter the use to which it is put, trespass is as appropriate in the one case as in the other and it does not matter that possession, the invasion of which is basic to trespass, is recognizable in the one case but not in the other. There is here, on this assimilation, a legal injury albeit no actual injury. This is a use of theory which does not square with economic or social fact under the circumstances of the present case.

28. (1975) 62 D.L.R. (3d) 68 at p. 70.

> What does a shopping centre owner protect, for what invaded interest of his does he seek vindication in ousting members of the public from sidewalks and roadways and parking areas of the shopping centre? There is no challenge to his title and none to his possession nor to his privacy when members of the public use those amenities. Should he be allowed to choose what members of the public come into those areas when they have been opened to all without discrimination? Human rights legislation would prevent him from discriminating on account of race, colour or creed, or national origin, but counsel for the appellant would have it that members of the public can otherwise be excluded or ordered to leave by mere whim. It is contended that it is unnecessary that there be a reason that can stand rational assessment. Disapproval of the owner, in assertion of a remote control over the "public" areas of the shopping centre, whether it be disapproval of picketing or the disapproval of the wearing of hats or anything equally innocent, may be converted (so it is argued) into a basis of ouster of members of the public. Can the common law be so devoid of reason as to tolerate this kind of whimsy where public areas of a shopping centre are concerned?[29]

On the proper classification of the visitor to publicly-used property, the Chief Justice balanced the competing interests as follows:

> If it was necessary to categorize the legal situation, which, in my view, arises on the opening of a shopping centre, with public areas of the kind I have mentioned (at least where the opening is not accompanied by an announced limitation on the classes of public entrants), I would say that the members of the public are privileged visitors whose privilege is revocable only upon misbehaviour (and I need not spell out here what this embraces) or by reason of unlawful activity. Such a view reconciles both the interests of the shopping centre owner and of the members of the public, doing violence to neither and recognizing the mutual or reciprocal commercial interests of shopping centre owner, business tenants and members of the public upon which the shopping centre is based.[30]

29. (1975) 62 D.L.R. (3d) 68 at pp. 73-74

30.(1975) 62 D.L.R. (3d) 68 at p. 74.

His Lordship recognized that this rule represented a modification of "ancient doctrine" in response to changed circumstance:

> It seems to me that the present case involves a search for an appropriate legal framework for new social facts which show up the inaptness of an old doctrine developed upon a completely different social foundation. The history of trespass indicates that its introduction as a private means of redress was directed to breaches of the peace or to acts likely to provoke such breaches. Its subsequent enlargement beyond these concerns does not mean that it must be taken as incapable of further adaptation, but must be applied on what I can only characterize as a level of abstraction which ignores the facts. Neither logic nor experience (to borrow from Holmes' opening sentence in his classic The Common Law) supports such a conclusion.[31]

Finally, the Chief Justice noted the parallel social facts upon which American courts had relied in attempting to delineate the constitutional rights of the public on property freely accessible to them:

> Recognition of the need for balancing the interests of the shopping centre owner with the competing interests of members of the public when in or on the public areas of the shopping centre, engaged Courts in the United States a little earlier than it did the Courts in this country. Making every allowance for any constitutional basis upon which Courts there grappled with this problem, their analyses are helpful because they arise out of the same economic and social setting in which the problem arises here. Thus, there is emphasis on unrestricted access to shopping centres from public streets, and on the fact that access by the public is the very reason for the existence of shopping centres; there is the comparison drawn between the public markets of long ago and the shopping centre

31. (1975) 62 D.L.R. (3d) 68 at p. 75.

> as a modern marketplace; there is the appreciation that in the light of the interests involved there can be no reconciliation by positing a flat all or nothing approach.[32]

I have quoted the reasons of the Chief Justice at considerable length for a number of reasons. First, the judgment makes clear that there comes a point at which absolutist notions of private property and its inherent characteristics must be abandoned. Second, there is a recognition of particular changed social circumstances which render such common law doctrines no longer appropriate in their original form in the case of publicly-used property. Third, as will be seen below, the legal position advocated by the Chief Justice - and indeed the rule for entry and exclusion stated by him - is essentially in accord with the non-legal expectations of both private property owners and the public in this province. Fourth, from a law reform standpoint, the forceful argument of the minority concerning the preferred state of the law in 1975 is not inconsistent with, but rather complements, the admonition of the majority that a contemporary balancing of social interests in this context must be left to the legislatures.

32. (1975) 62 D.L.R. (3d) 68 at p. 75.

CHAPTER THREE

THE TRESPASS TO PROPERTY ACT, 1980

Viewed in its common law context, the legislative initiative which culminated in the Trespass to Property Act, 1980, was unfortunate in certain respects. It took no account of the developing trends in balancing the competing social interests in publicly-used property. It instead crystallized the absolutist common law position in Ontario, and thereby foreclosed further development. The difficulty is that this was achieved in a most indirect and perhaps unintended way. It is evident from the Attorney General's Discussion Paper of May, 1979 that the principal aim of the legislation was to clarify and strengthen the rights of rural owners of farms and recreational lands to exclude unwanted visitors, and many of the provisions of the T.P.A. were obviously designed for this purpose.

Nothing in this report is intended to minimize or criticize this objective in any way; however, as some opposition members pointed out in the course of the debates in the Legislature and the Standing Committee on Resource Development, the T.P.A., like its predecessors, makes no distinction for purposes of exclusion between different types of property and the degree of public use. Under the T.P.A., the owner or a security guard at a shopping mall has precisely the same

right of exclusion from the common areas of the shopping centre as a private home owner or residential tenant is given to choose who will occupy his or her living room. Since there is no differentiation among types of property, the virtually absolute right of exclusion which attaches to the private home or farm applies equally in situations where the general public has a standing invitation to enter. In the absence of a dividing line between types of property, there is no limitation in the T.P.A. on the owner's power of exclusion and no requirement of inappropriate conduct before this power can be invoked. In short, like a private home, publicly-used property carries with it a general right of exclusion under the T.P.A., which is legally subject to the owner's whim. The "extravagent position" which was trenchantly criticized in Harrison v. Carswell was effectively codified (and made more easily enforceable) by the T.P.A.

Legislative history

The first legislation in Ontario to deal with trespass to private property was enacted in 1834. This statute did not replace the common law civil remedy, but was intended to co-exist with it by providing a less cumbersome method for enforcing an owner's right to exclude trespassers.

An Act Respecting Petty Trespasses appeared in the Consolidated Statutes of Upper Canada as chapter

105, and in the same form as R.S.O. 1887, chapter 101 and R.S.O. 1897, chapter 120. It was re-enacted under the title Petty Trespass Act in 1910, and appeared, subject to minor amendment, in R.S.O. 1914, chapter 111, without further change through the revisions of 1927 to 1950 inclusive, and, subject to some amendment, in R.S.O. 1960 and R.S.O. 1970.

Until amendments to The Petty Trespass Act in 1954, the governing sections of the Act were as follows:

> Section 1: Any person who unlawfully enters into, comes upon or passes through or in any way trespasses upon any land the property of another person, which is wholly enclosed or is a garden or lawn, shall incur a penalty of not less than $1 nor more than $10, whether any damage has or has not been occasioned thereby, recoverable under The Summary Convictions Act.
>
> Section 2: Any person found committing such a trespass may be apprehended without warrant by any peace officer, or by the owner of the land on which it is committed, or the servant of, or any person authorized by such owner, and be forthwith taken before the nearest Justice of the Peace to be dealt with according to law.

Section 1 was amended in 1954 to provide as follows:

> Section 1: (1) Every person who unlawfully enters or in any other way trespasses upon another person's land
>
> (a) that is enclosed;
>
> (b) that is a garden or lawn; or
>
> (c) with respect to which he has had notice by word of mouth, or in writing, or by posters or sign boards so placed as to be visible from every point of access to the land, not to trespass,
>
> and whether or not any damage has been occasioned thereby, is guilty of an offence and on summary

conviction is liable to a fine of not less than $10 and not more than $100.

(2) Where an offence under subsection 1 is committed by means of a motor vehicle, the driver of the motor vehicle, not being the owner is liable to the penalty provided under subsection 1 and the owner of the motor vehicle is also liable to the fine provided under subsection 1 unless at the time the offence was committed the motor vehicle was in the possession of a person other than the owner or his chauffeur without the owner's consent.

The operative provisions of the T.P.A.

The Petty Trespass Act was replaced by the Trespass to Property Act. The relevant provisions of the T.P.A. are as follows:

Section 2: (1) Every person who is not acting under a right or authority conferred by law and who,

(a) without the express permission of the occupier, the proof of which rests on the defendant,

(i) enters on premises when entry is prohibited under this Act, or

(ii) engages in an activity on premises when the activity is prohibited under this Act; or

(b) does not leave the premises immediately after he is directed to do so by the occupier of the premises or a person authorized by the occupier,

is guilty of an offence and on conviction is liable to a fine of not more than $1,000.

Section 3: (1) Entry on premises may be prohibited by notice to that effect and entry is prohibited without any notice on premises,

(a) that is a garden, field or other land that is under cultivation, including a lawn, orchard, vineyard and premises on which trees have been planted and have not attained an average height of more than two metres and woodlots on land used primarily for agricultural purposes; or

(b) that is enclosed in a manner that indicates the occupier's intention to keep persons off the premises or to keep animals on the premises.

(2) There is a presumption that access for lawful purposes to the door of a building on premises by a means apparently provided and used for the purpose of access is not prohibited.

Section 5: (1) A notice under this Act may be given,

(a) orally or in writing;

(b) by means of signs posted so that a sign is clearly visible in daylight under normal conditions from the approach to each ordinary point of access to the premises to which it applies; or

(c) by means of the marking system set out in section 7.

(2) Substantial compliance with clause (1)(b) or (c) is sufficient notice.

Section 9: (1) A police officer, or the occupier of premises, or a person authorized by the occupier may arrest without warrant any person he believes on reasonable and probable grounds to be on the premises in contravention of section 2.

(2) Where the person who makes an arrest under subsection (1) is not a police officer, he shall promptly call for the assistance of a police officer and give the person arrested into the custody of the police officer.

(3) A police officer to whom the custody of a person is given under subsection (2) shall be deemed to have arrested the person for the purposes of the provisions of the Provincial Offences Act applying to his release or continued detention and bail.

Section 10: Where a police officer believes on reasonable and probable grounds that a person has been in contravention of section 2 and has made fresh departure from the premises, and the person refuses to give his name and address, or there are reasonable and probable gounds to believe that the name or address given is false, the police officer may arrest the person without warrant.

Interpetation of the T.P.A.

It is clear to me from a reading of the T.P.A. that the Act creates the potential for unduly restrictive or discriminatory enforcement against minorities and youth.

Under subsection 1(1) of the Act, "occupier" is defined, in essence, to include persons in possession or control of premises. Section 2 then creates three offences:

(a) entering on to premises where entry has been prohibited;

(b) engaging in an activity which has been prohibited;

(c) failure to leave the premises immediately upon being directed to do so by the occupier or a person authorized by the occupier.

Under paragraph 5(1)(a), a prohibition against entry or activity can be given orally or in writing. Under subsection 9(1), a person believed on reasonable and probable grounds to be on premises contrary to section 2 can be arrested without warrant by a police officer, or the occupier of premises, or a person authorized by the occupier. When the person making the arrest is not a police officer, he or she is

required to call promptly for the assistance of a police officer and is entitled to detain the member of the public until the police officer arrives.

It therefore follows that the provisions of the T.P.A. permit an occupier or manager of publicly-used property or a security guard or other official authorized for this purpose to require any member of the public to leave the property at any time, for any reason or for no reason at all. This can be accomplished either orally or by written notice. If the person does not leave immediately upon being told to do so, he or she commits an offence punishable by a fine of up to $1,000, and may be arrested by the official and delivered into the custody of a police officer. Failure to pay can result in a jail term under the Provincial Offences Act.

Moreover, there is no necessary time limit on the prohibition against entry. Thus, unless the occupier voluntarily limits the duration of the "ban" (or "bar"), the visitor who leaves when directed to do so cannot re-enter the property later the same day, or the next day, or indeed the next year, or at any time thereafter. A visitor does so upon risk of arrest or receipt of an offence notice under the Provincial Offences Act, which compels the defendant visitor either to pay a fine out of court (in the same fashion as a parking ticket) or to appear in court to defend the matter.

It is therefore apparent from the provisions of the T.P.A. that wide "prosecutorial" discretion is vested in the occupier of publicly-used property to choose when, how and for how long to exclude any individual person among the multitudes who avail themselves of the general invitation to enter such property. It is quite obvious that any such broad conferral of discretion carries with it a potential for arbitrary or discriminatory enforcement, particularly against groups such as youth and minorities who may not fit within stereotypical notions of "preferred visitors". I do not, however, rely at this point on perceived or actual conduct of this kind by occupiers, which I propose to discuss later; it is sufficient for present purposes to note the evident potential for abuse of discretion on the face of the T.P.A.

It was pointed out to me, notably by representatives of police forces, that discretion in enforcement in the T.P.A. is not unique, and is not necessarily inappropriate in itself. Far from it, discretion is not only unavoidable but desirable, because without discretion a justice system would become dehumanized and unworkable. I do not quarrel with these comments in their application to the justice system as a whole; I simply point out two distinctive attributes of the T.P.A. which place it in a different category from most penal legislation.

The T.P.A. is unusual in that it places private citizens - essentially the owners of publicly-used property and those authorized by them - in the central role of policing this Act. Thus, unlike most quasi-criminal statutes, implementation of society's prohibitions against unacceptable conduct is left largely in the hands of persons who have no necessary accountability, or indeed training for the role. It is argued, however, that while this applies to the "informal" stages of warning persons to leave and banning them from further entry, it does not apply to prosecution, since the police must get involved in order to lay a charge, and officials of the Attorney General's Ministry enter the picture thereafter. It must be noted, however, that the police and the prosecutor can only play a limited supervisory role, both because of their belated involvement under the scheme of the Act, and because it is the occupier who effectively defines whether an offence has occurred by choosing those individuals who will have their entry privilege revoked.

This last consideration points towards the second distinction between the T.P.A. and, for example, the Criminal Code: the absence of any requirement of an overt act or misconduct on the part of an unwanted visitor other than sheer presence on the premises. A police officer must have reasonable and probable grounds to arrest an individual for the commission of an offence, while the occupier of publicly-used property

need only have reasonable and probable grounds to believe that the visitor has been banned from entry or ordered to leave, one minute or one year ago, where that banning notice was equally in the control of the occupier. In other words, the occupier can readily create an offence through the "improper" issuance of a banning notice, and thereafter undoubtedly has reasonable and probable grounds to arrest if a person remains or is discovered on the premises. It is the occupier's right to exclude for the simple reason that "this is private property".

Arguments Against Modification of the Act

I summarized earlier the polarized positions taken by the parties who made representations to this Task Force. I now propose to set out, in somewhat greater detail, the principal arguments against modification of the unfettered discretion which is accorded to occupiers of publicly-used property by the T.P.A.

1. Private ownership.

Regardless of the general invitation to the public, most of the properties falling within the ambit of this Task Force are privately owned. In addition to the original capital costs of construction, the private owners pay the maintenance, heating, lighting, cleaning and security costs. The owners pay taxes on the common

areas, and may be liable for injuries sustained by the public in such areas. The International Council of Shopping Centres, for example, reasoned that "ownership involves both rights and obligations", and asserted that "to single out particular classes of owners and deny them rights that other property owners have and have always had is in itself discriminatory".

2. Avoiding turmoil and commotion.

It is in the interest of the public as well as the owner group that "turmoil" and "commotion" be avoided in properties to which the public ordinarily has access. Shopping centres, for example, are facilities whose success depends in great measure on the maintenance of a safe, secure and psychologically comforting environment. The ability to provide such an environment is vitally dependent upon the power to exclude undesirable elements which deter the general public from using the facility.

3. Low incidence of enforcement.

Statistical evidence concerning the use of the Act indicates an extremely low incidence of enforcement when compared to the huge figures representing traffic through these properties. This seems to be true of all publicly-used properties, and particularly shopping centres. The explanation given for the relatively infrequent use of the Act is that the T.P.A.

itself represents a last resort, which is invoked only when lesser measures have failed. This approach is put forward as evidence that there is not widespread abuse of the right of exclusion under the T.P.A.

4. Avoiding more serious charges.

The T.P.A. serves as an effective, yet relatively unobtrusive behaviour control mechanism. Removal of the power to ban or arrest individuals for undesirable behaviour would inevitably lead to greater use of the Criminal Code, and so the police find the T.P.A. helpful in "keeping other statistics lower". Indeed, the T.P.A. itself provides a graduated system of responses to trespass, escalating from warnings to ban notices, to arrests, depending upon the seriousness of the situation.

5. Avoiding police in private domains.

Withdrawal from the owner group of the right of exclusion would result in the need for increased police involvement on privately-owned property, which is seen as undesirable. Moreover, police forces were portrayed as neither equipped nor financially able to provide the protection to property and the public generally which is now expected of and provided by security personnel.

6. Inadequacy of alternative charges.

A related argument is that the Criminal Code alternative is not only heavy-handed but ineffective, in that it requires resort to a justice system that is said to be overextended and inefficient. Unlike the T.P.A., for example, the Criminal Code provides no means of "out of court settlement".

7. Existence of alternatives to statutory amendment.

Because of the low incidence of application of the T.P.A., specific examples of abuse should not result in a general abrogation of the right of exclusion, but should rather be dealt with through less sweeping remedies, such as enforcement of the Human Rights Code and community efforts to deal with particular "hot spots".

CHAPTER FOUR

PUBLICLY-USED PROPERTY: SOCIAL IMPORTANCE AND SOCIAL RESPONSIBILITY

A proper response to the concerns listed at the close of Chapter Three requires consideration of the role and social significance of publicly-used properties in contemporary Ontario society. My analysis will focus upon shopping malls, which appear to be the "lightning rod" of concern regarding the application of the T.P.A. The principal points which I propose to make are relevant and have similar force in the context of other publicly-used properties.

Public perceptions

The widespread public perception today is that shopping centres are "public property" or "public places", in the sense that persons have the right to enter freely, walk around, converse with others and remain within the common areas of the mall as long as they wish, much as they would conduct themselves in a city square. This "public character", which of course does not correspond to the legal position under the T.P.A., was conveyed to me by virtually every user group whom I heard from, and was put most forcefully by the users - young people and minority members of the public - themselves. Indeed, this public perception was

freely acknowledged by most of the shopping centre representatives.

The inconsistency between the legal position and the common understanding was cited by the police forces, security officers and the Ontario Human Rights Commission as a central problem which resulted in strained communications between enforcement officials and the public and frequent resentment on the part of minority groups and young people. At a minimum, public education was advocated as a means of spanning the gap between these "two solitudes".

I agree with this recommendation, and commend the efforts of the Metropolitan Toronto Police Force, the Council on Race Relations and Policing and the Human Rights Commission in providing public education through such means as seminars and video presentations. In my view, however, the inconsistency between public understanding and law points to the more significant conclusion that the law has simply failed to keep pace with social change.

The need for "third places"

Academic research confirms the recurring message which I received during my consultations: that there is a lack of suitable community facilities for people - particularly young people - to simply meet, converse, "see and be seen"; that these needs are vital

ones, and providing them is a principal function of urban and town planning; and that shopping malls have willingly, and for good commercial reasons accepted this role.

Unmistakably, the social activity which is referred to here can be described as "hanging out". I do not intend by this graphic label to minimize the importance of the social activity which it captures. Sociologists and psychologists describe the need for a "secondary territory" or "a third place": a respite from the treadmill between home and school, a place for enjoying social life.

Thus, it has been said of such "third places":

> Generally, a third place is open to the public and easily accessible to those who have claimed it as their own ....
>
> Sociability is not premised on the qualification of the people involved. [A sociologist] called it life's most purely democratic experience .... depending on when people stop in at at third place (and they are always both unbidden and most welcome) they may chance to meet the friend of a friend, someone's visiting relative, someone new to the neighbourhood - or perhaps just some of the regulars. ....
>
> Along with this combined sense of individual distinctiveness and of comradeship, third places offer an alternative to structure and schedule; they are a reminder that the most enjoyable and memorable moments of our lives are not really planned.33

33. Oldenburg and Brissett, The Essential Hangout, Psychology Today, April 1980, pg. 82.

In her seminal work, The Death and Life of Great American Cities, Jane Jacobs characterized the importance of this sort of informal social contact, and the vital role of municipalities in providing for it:

> Most of [such contacts] are ostensibly utterly trivial, but the sum is not trivial at all. The sum of such casual, public contact at a local level - most of it fortuitous, most of it associated with errand, all of it metered by the person concerned and thrust upon him by anyone - is a feeling for the public identity of people, a web of public respect and trust, and a resource in time of personal or neighbourhood need. The absence of this trust is a disaster of a city street. Its cultivation cannot be institutionalized. And above all, it implies no private commitments.
>
> I have seen a striking difference between presence and absence of casual public trust on two sides of the same wide street in East Harlem, composed of residents of roughly the same incomes and same races. On the old-city side, which was full of public places and the sidewalk loitering so deplored by Utopian minders of other people's leisure, the children were being kept well in hand. On the project side of the street, across the way, the children, who had a fire hydrant open beside their play area, were behaving destructively, drenching the open windows of houses with water .... nobody dared to stop them.[34]

Jacobs explained that properly designed public spaces become self-policing, because entrants assume a position of belonging and control. In addition, there appear to be two alternatives where the "life of the sidewalks" is absent. The first is "increased togetherness" which works well for "self-selected upper-middle class people", who can afford substituted forms of socialization such as clubs, restaurants and other "indoor" amenities which avoid the intensity and

34. Jacobs, The Death and Life of Great American Cities (1961), pp. 56-57.

structure of the "first two places". For most people, this is what a later generation would call "alienation": "In city areas that lack a natural and casual public life, it is common for residents to isolate themselves from each other to a fantastic degree".

Jacobs concluded with respect to large urban areas:

> The tolerance, the room for great differences among neighbours - differences that often go far deeper than differences in colour - which are possible in intensely urban life, but which are so foreign to suburbs and pseudo-suburbs, are possible and normal only when streets of great cities have built-in equipment allowing strangers to dwell in peace together on civilized but essentially dignified and reserved terms.
>
> Lowly, unpurposeful and random as they may appear, sidewalk contacts are the small change from which a city's wealth of public life may grow.[35]

In ancient Greece, the place for unstructured socialization was the agora - the marketplace - and this tradition has carried on in Western societies over the centuries since then. Psychology Today described a later period this way:

> In eighteenth century London, prosperous citizens spent many of their free hours in coffeehouses, chatting, exchanging gossip, sipping coffee or chocolate - in short, just hanging out ....
>
> [Later] there was the local tavern, as well as the small-town express office and the corner drug store.

35. Jacobs, supra, p. 72.

> Today, the neighbourhood tavern survives, but most other places of its type are gone.[36]

More recently, in Ontario and elsewhere, the public square and the street corner served this purpose.

Today, a major problem facing young people in particular is a lack of available places which satisfy their needs for such gatherings. There are few places where the field for selecting friends, opportunities for peer interaction and meeting companions of the opposite sex is as large and diversified as the shopping centre. This is particularly true in suburban areas which frequently grew up without a great deal of planning for public spaces and social facilities of this kind. In downtown areas, on the other hand, shopping malls literally displaced and enclosed city streets, street corners and plazas.

The transition from the public character and administration of markets and town squares to enclosed, privately-owned facilities brought with it a new dimension of control in these informal meeting places. The creation of a proper ambience and internal environment through private control has been one of the central themes of the shopping centre success story.

36. I. Altman, The Environment and Social Behaviour: Privacy, Personal Space, Territory, Crowding (1975).

The rise of the shopping centres

It is no accident that in the thirty years since the construction of the first enclosed mall by Victor Gruen at Eureka, Minnesota, the construction and design of malls have become highly systematized and sophisticated expressions of their central social position. As one American writer put it, "malls aren't part of the community. They are the community."[37]

Two conventional observations about the shopping mall are that because of its status as a community centre, it is "the new Main Street" and because of its bright array of consumer products, it is a "Disneyland for adults". Kowinski has demonstrated that these images are inextricably linked.[38] At Disneyland and Disney World, the famous amusement parks, commercial environments were created in a preplanned, enclosed, protected and controlled way. The popular mythology about small towns was used to create Main Street U.S.A. This Main Street had a town plaza at each end, and no cars or trucks to disturb its pedestrians. And unlike the main street of Marceline, Missouri, upon which it was based, Main Street U.S.A. was devoid of

37. Ralph Keyes in We, the Lonely People, quoted in Kowinski, The Malling of America: an Inside Look at the Great Consumer Paradise (1978), p. 65.

38. Kowinski, supra, p. 65.

puddles, and mud, and telephone lines; it was clean, dry and colourful, and was lined with shapely trees.

The first enclosed shopping malls were built at the same time as these amusement parks. The rows of stores were set up as if they were on a street; the street was enclosed and bounded by plazas or courts, and the public was safe from traffic. With the addition of plants and trees, the mall's street looked unified, quaint and familiar, and eliminated the unwanted aspects of the street: noise, traffic, air pollution, precipitation and extremes of climate.

Into the mall, and onto its closed streets, have been added most of the amenities associated with community life, whether downtown, suburban or in a small town: retail establishments of every conceivable kind; restaurants, fast food outlets and bars; banks, trust companies and real estate offices; professional offices of doctors, dentists and lawyers; amusement parks, movie- and play-houses and stages for musical events, puppet shows and fashion shows; law courts, public libraries and even funeral homes. Frequently, essential services such as youth programs and counselling agencies are found in shopping plazas and <u>nowhere else</u> in the city. In an academic study commissioned by the International Council of Shopping Centers and submitted to me by its Toronto counsel, the author concluded:

> To many young people, therefore, shopping centres are suburban street corners where city kids

> congregate. What other single location offers as much diversified activity? You can shop; you can sit; you can meet friends and talk; you can look around, and you can eat. Compare this with the limited opportunity offerred, for example, at a movie theatre or a school dance. Furthermore, in many communities schools are not open evenings and over weekends when youngsters have available leisure time, and many teen centres offer too limited a choice. As a result, and in large part due to the lack of alternatives, shopping centres are popular hangouts.[39]

The study concluded that 46.7% of teenagers came to malls in the Philadelphia area "to meet people", or because there was "nothing else to do", and 49.5% came "to shop". The central role of shopping centres in Ontario as a location for community interaction is reflected in the fact that in terms of time spent by the average citizen, shopping centres rank third, after (1) home and (2) work or school. This startling statistic is bolstered by data which I received from the Canadian Institute of Public Real Estate Companies which indicates the size and scope of the Canadian shopping centre industry today from both a retail and a human standpoint.

39. Millison, Teenage Behaviour in Shopping Centres (1976).

	1985 - Total Retail Sales in $ Billions	Est. Sales in $ Billions	*Est. range of No. of Trans-actions in Billions	No. of Shopping Centres over 50,000 sq. ft.
Canada	75.0	49.0	3.2	1,150
Ontario	27.0	18.0	1.2	450
Metro Toronto	10.3	7.0	0.5	90

*Estimated transactions are the estimated number of individual retail sales, and generally understate the actual volume of traffic, since they do not include persons accompanying the purchaser or people passing through.

These figures indicate that in 1985, some 3.2 billion people completed retail purchases in 1,150 shopping centres in Canada. Thus, the number of purchases averaged 2 to 4 million per centre. The average number of purchases per shopping centre in Ontario also fell within the same range; however, for Metropolitan Toronto, the average ranged between 4.4 and 8 million per shopping centre. The reason for this difference is that there are a number of malls in Metropolitan Toronto with annual traffic of over 10 million, and the Eaton Centre has a yearly total of 50 million visitors.

The last thirty years have seen the assumption by shopping centres of an increasingly dominant place in the commercial, recreational and social activities of our municipalities. As in the United States, the process began on the outskirts of

towns and the suburbs surrounding the cities. These malls, located outside town and city centres, were both the result, and a principal cause, of the shift in population and commercial activity away from the traditional Main Streets. Even 10 to 15 years ago, the "communal rituals" of more traditional communities had been replaced by the "Saturday trip to the shopping centre", and malls had become the accidental capitals of suburbia.40

The accent then shifted to rebuilding the commercial districts of downtown municipalities so as to reverse the flow of activity, and to some extent, of population. The result was the "malling" of some downtown districts and the increasing enclosure in public-used space of prime locations which had, in some cases, literally been street, sidewalks and squares. The City of Toronto now has the largest "underground city" in North America. Although I could not obtain precise figures for downtown Toronto, I was informed that by 1990, the underground shopping district in Montreal is expected to contain fully one-half of the retail shopping capacity of that city.

The most recent trend in the shopping centre industry is a shift from new development to expansion and redevelopment of existing centres. The last decade

40. Kowinski, supra, p. 139.

has seen a noticeable move in the direction of renovating and redesigning existing facilities. In some cases, developers have reacted to the public attraction and commercial success of indoor malls by enclosing shopping centres which had functioned for decades as open-air facilities. On the other hand, many covered malls have been updated through the inclusion of modern design features and particular themes, as well as the creation of more attractive non-retail space and linkage with office, transit and neighbourhood facilities.

The International Council of Shopping Centers did not exaggerate in describing many of its member centres as "the hub of community and civic life, in addition to meeting the public's needs for modern, convenient shopping facilities." This role can be seen in the prime locations, usually near the centre of municipal traffic, in which shopping centres are found. In major Ontario cities, the large shopping centres are now closely linked with municipal transit systems, particularly in Toronto, where access to the subway frequently requires travelling through the extensive above grade and underground shopping district.

Community and social responsibility

All of the shopping centre representatives who met with me stressed the role of these facilities as community centres with social responsibilities to the towns which they serve. For example, Cadillac Fairview,

which owns the Eaton Centre, forthrightly stated its "philosophy" that a shopping centre is more than a place to shop. It was important to become an integral part of the community around it, and to provide more than a selection of materials and goods. The Eaton Centre, reflecting its advertising slogan "My City, My Centre", was a place to be entertained and a place for the public to be informed through, for example, the Municipal Health Department or the Boards of Education. The representatives of Cadillac Fairview noted that they carried on joint programs with the Scarborough Board of Education at Cedarbrae Mall by providing free office facilities in which to run programs for high risk students who would otherwise leave school. It was noted that a similar program was in effect at Limeridge Mall in Hamilton, and was to be instituted at Hillcrest Mall in Metropolitan Toronto. It was further noted that the Woodbine Centre housed an off-site campus of Humber College to provide continuing education courses.

Enlightened approaches to community participation by shopping centres have resulted in the development of innovative programs aimed primarily at young people. Markborough Properties Ltd., which operates Woodside Square Shopping Centre in Agincourt, has developed three distinct programs in conjunction with the school board: "Adopt-a-School", in which students from nearby schools are given hands-on experience in marketing as part of their business courses; recreational activities at the shopping centre;

and a satellite classroom, in which high school students make use of shopping centre office space for a half day credit in business courses. While most shopping centres provide space for the activities of various community organizations and charitable groups, it appears that programs directed at youth and minority groups have been relatively infrequent.

The undertakings described above exemplify the commendable efforts of many of the large shopping centre developers in various cities and towns across Ontario.

In my view, however, there has been insufficient recognition by owners of publicly-used property of the need to provide for uses by the public which may not contribute, directly or indirectly, to the principal goal, which is usually profitability. The virtual monopoly which the owner groups have been given (and have created) over prime settings for community life - in short, the privatization of the town square - must carry with it a corresponding obligation to provide for "non-productive uses".

One tool which is available to society to further this aim is the legal recognition in the T.P.A. of the public use of such private property. Another way

of tackling the same problem is by addressing design issues in the construction of publicly-used spaces.[41] For example, most shopping malls are designed so as to direct pedestrian traffic past as many shop windows as possible, even when the pedestrian's goal is to travel between access points such as subway and street entrances. Shopping centres encourage people to consume, but create an environment which does not enable them to meet their basic needs for expression, belonging and social contact. These goals are compatible, and their feasibility can be seen in some malls which combine commercial uses with comfortable chairs and places to socialize near the thoroughfares of pedestrian traffic. Indeed, studies by Professors Brown, Maclean and Sijpkes at McGill University have demonstrated the distinctions in design and corresponding principal use between, for example, Complexe Desjardins and Cavendish Mall in Montreal. I will return to this question of design of public spaces later in this report.

41. See the following papers by Professors P. Sijpkes, D. Brown and M. Maclean: "Public Indoor Space; the problem and some solutions" (Proceedings of the International Design Participation Conference, Eindhoven, Holland, 1985); "Public Indoor Space and Advocacy Architecture" (Proceedings of the ACSA Northeastern Region Meeting, Montreal, 1985); "Critiquing the underground city", Planning, 51, 3, 16-17 (1985); "The Indoor City: Can it be successfully integrated into the urban fabric?" City Magazine, 7, 4, 16-21; "The Community role of public indoor space", Journal of Architecture and Planning Research, 3:161-172 (1986).

Hanging Out as a Social Activity

It will be apparent from the foregoing discussion that I do not view "hanging out" in itself as a problem. From the psychological and sociological viewpoint to which I referred to above, it is a healthy and indeed necessary pastime in a contemporary world which is increasingly dominated by concerns of family and work. Urban planners and architects whom I consulted sought the creation of viable and usable places to hang out as one of the principal challenges to be met by urban development and building design in the 1980's and 1990's.

Groups representing minority ethnic communities noted that in many of their countries of origin, civic and social discourse is focused even today on the streets and street corners. This sort of "hanging around", rather than more formal indoor meetings or telephone communications, is indispensible in these countries to effective social participation. When they arrive in Canada, these immigrants often find that the street corner meeting points have been enclosed in concrete, and particularly with Canada's often inhospitable climate, the equivalent social interaction must take place, if at all, in privately-owned spaces such as shopping centres.

Shopping centre owners and developers readily recognized that members of the public, and particularly

the young people, consider shopping malls to be a "social gathering place" and a "low-cost meeting place", and the malls actively encourage this activity by providing a constant pleasant climate and a place of entertainment. Considerable promotion and merchandizing resources are devoted to attracting young people to shopping facilities. Under the heading "Is There a Problem", the International Council of Shopping Centers stated in its submission:

> It is no secret that large numbers of youth often meet and socialize in shopping centres. They also shop. Shopping centre owners do not consider teenagers to be a problem, but rather view them as present and future shoppers who should, as much as possible, be courted. It is only sensible for owners to be of this view. Teens, and the rest of their families by implication, comprise a significant portion of the community upon which the centers depend.

To be sure, some degree of hanging out is a direct result of the current degree of unemployment, particularly among young people, and for many, a lack of challenging or interesting alternative activities. As the Metropolitan Toronto Children's Aid Society pointed out, the legal problems associated with the T.P.A. cannot be divorced from the social system in which the legislation operates. The interests of youth and minorities require the development of "unconventional

loosely structured and outreach-oriented services" such as the provision of drop-in centres and streetworker delivered services tackling concerns such as counselling, employment and literacy.

Yet I do not minimize these pressing social concerns in the least in asserting that "hanging out" is itself a positive thing, and the provision of viable public spaces through urban planning and a proper legal regime is itself a priority.

The need for open public spaces is most evident in areas of Metropolitan Toronto which are dominated by large-scale public housing projects, such as the Jane-Finch area and Regent Park. In a well-intentioned drive to build vast quantities of affordable housing for low income families, little attention was given to the incorporation of public spaces and diversity of uses.

Over 38,000 people live in the two square miles surrounding the intersection of Jane Street and Finch Avenue, "two major thoroughfares, with a gigantic mall on one corner, a dull little plaza on another, and a numbing concentration of towering apartment buildings all around."[42] The area has a high crime rate, open

42. Toronto Star, November 30, 1986, p. F1.

drug sales (which I witnessed on a guided tour through the area) and persistent charges and counter-charges by two groups of residents: one demanding greater police enforcement to remove unwanted "gangs" from their properties, and young people, particularly members of visible minorities, alleging harrassment by police and store and mall owners.

Regent Park is a Toronto neighbourhood of about 10,000 people which is characterized by high-density housing, the majority of which is government subsidized. In fact, Regent Park is the oldest and largest public housing development in Canada. Like the Jane-Finch area, about half of Regent Park residents are visible minorities or youth. Again, there is a lack of recreational programs, high unemployment, and limited public space in Regent Park. Over the last decade, relations between the police and minority and youth groups have often been strained.

Similar patterns have emerged in other areas exhibiting congestion and lack of diversity and public space. I do not wish to overstate the cause-effect relationship, nor do I intend to minimize the significant impact of organizations such as the Division 31 Committee on Race Relations and Policing, the present Council on Race Relations and Policing and the Regent Park Advisory Committee on Police Community Relations, which have made significant inroads, particularly into

the police harassment issue, within the constraints imposed by these urban settings. It is nevertheless worth repeating, as Jane Jacobs theorized over twenty-five years ago, that the provision of physical and psychological community space can fulfill vital community needs and at the same time render such areas more orderly and safe.

CHAPTER FIVE

THE EVIDENCE CONCERNING ENFORCEMENT OF THE TRESPASS TO PROPERTY ACT

Part of my mandate in undertaking this Task Force was to examine the administration and enforcement of the T.P.A. in order to determine whether the statute creates the potential for unduly restrictive or discriminatory enforcement against minorities and youth, and whether such enforcement is in fact taking place. I concluded earlier in this report that the potential for abuse of the discretion provided by the Act is clear on the face of its provisions. This lack of safeguards is significant in view of the social importance of publicly-used property.

I turn in this chapter to the evidence which I have obtained concerning the administration of the T.P.A. This is an area in which the original dichotomy between the owner and user groups presented itself very sharply. Although I will provide some of the specific statistical and anecdotal information which I received from the two groups for purposes of illustration and for the record, my findings can be summarized briefly at the outset of each section.

Evidence of the owner groups

The evidence of the owners was that the T.P.A. did not cause much of a change in their practices under the former legislation; indeed, many representatives referred to the present statute in their oral and written submissions as the Petty Trespass Act. The practice as relayed to me by the senior management of the owner groups is that the T.P.A. provides a system of graduated responses to deal with offensive behaviour, and that it is not used in any case in the absence of such behaviour. The graduated responses consist of a request to stop the misbehaviour, followed by a warning, followed in turn by a ban notice, and upon return or repetition, an arrest and prosecution.

It was uniformly asserted by senior management that the more severe sanctions of banning notices and prosecutions are imposed only in the last resort, after lesser measures had proven ineffective, and that this system is consistent with the desire of the owners to be good corporate members of the community and to attract all segments of the community, including minorities and youth, to come to their centres, and not to discourage them from doing so. Young people were singled out as valued customers for two reasons. First, many enterprises were geared either totally or significantly to a youthful clientele, such as many record stores, clothing shops and video arcades in malls as well as the Canadian National Exhibition; rock concerts

and sports events. Second, for shopping malls as well as many of the other public attractions, common sense and established marketing practice dictates that young people be encouraged and groomed to be regular and loyal customers in the future. Both of these reasons militate against unwarranted exclusion by owners and their agents under the T.P.A.

Thus, I received the consistent message from the owner groups that although the discretion to exclude under the T.P.A. is virtually absolute, it is only intended to be used in response to incidents of identifiable misbehaviour which represent a disruption to the activities of the publicly-used property; even then, as described above, it is a last resort. The types of misconduct which have led to the use of the T.P.A. have included:

loitering
theft
intoxication
concealed weapons
fraud
vandalism
spitting
harassment or threatening
possession of stolen goods
obstructing justice
panhandling
suspicious activity
assault
fighting
sex act
obscene language
causing disturbance
breaking & entering
destruction of private property
truancy

The evidence indicated that in most cases, ban notices were issued without time limitation, although managers of publicly-used property were receptive to approaches by banned entrants or in the case of young people, their parents, to reduce the time

period or rescind the notice altogether. Such requests were considered on a case-by-case basis and depended on an individual assessment of the likely behaviour of the banned visitor.

A sampling of more detailed information concerning use of the T.P.A. follows:

Cadillac Fairview owns and manages twenty shopping malls in central Ontario. It stated that incidents requiring use of the T.P.A. arose in very small proportion to the numbers of individuals who enter shopping malls, but when they did occur, such incidents could be relatively serious. The company provided statistical information concerning nine suburban malls, and I have tabulated that information in Appendix 6.

The Eaton Centre was isolated by Cadillac Fairview as a special case, in that it has a "significantly greater flow of traffic and a larger proportion of disturbance than the suburban malls. The Toronto Eaton Centre has become a 'regional' attraction as opposed to suburban malls that generally draw from a smaller geographical area. It has also become a tourist attraction in its own right, unlike most 'suburban' malls".

The Eaton Centre has 309 retail tenants, and 1.5 million people pass through the Centre each week. Security services have been contracted out since

approximately August, 1985 to Intercon Security, but they operate under the direction of the Eaton Centre management. It appears that about 100 individuals are given banning notices, and another 100 are arrested for trespass each month. The statistical information for two sample months was provided to me by Cadillac Fairview, and I have duplicated it as Appendix 7.

The Canadian Institute of Public Real Estate Companies (CIPREC) provided a good deal of helpful information concerning shopping centre usage of the T.P.A., including breakdowns of bar notices issued between male and female visitors and by age groups. I have included its original charts as Appendix 8. They indicate that the number of bar notices varies from a high of 1 notice per 12,500 to 1 notice for several million visitors for specific properties, and that the average for the 18 properties surveyed was about 1 notice for every 55,000 visitors. The ratio of arrests and prosecutions for those properties which record this information is significantly lower.

Bramalea Ltd. owns and operates eleven shopping centres in Ontario, ranging from major regional shopping centres to small community strip plazas. A list of shopping centres, together with a summary of pertinent information provided by Bramalea, is found at Appendix 9. For a one year period, the data showed an approximate traffic count of 17,328,000; there were 375

ban notices and 550 charges. Reasons for issuing the ban notices were recorded, and 60% were covered by the categories "loitering", "suspicious activity" or "general". The remainder related to alleged criminal offences.

Cambridge Leaseholds Ltd. is a public real estate investment company which operates 17 shopping centres in Ontario containing in excess of six million square feet of rental space. A list of Cambridge's shopping centres, together with rentable area, is attached as Schedule 10. The T.P.A. was invoked most frequently at Gerrard Square, a shopping mall located in the inner city core of Toronto, which has approximately three million visitors per year. In a twelve month period, there were 89 evictions from Gerrard Square, 69 of them for alleged theft. Other misconduct resulting in removal included sniffing glue, causing a disturbance, harassing a female employee, loitering and spitting over a balcony. Security is provided by in-house staff.

Marathon Realty Company Ltd. owns commercial properties including office buildings and ten shopping centres in Ontario, with a total of about 2,608,000 square feet of rentable space. An approximate traffic count is 25 million visitors during the calendar year 1985. During that year, 343 ban notices were issued, over half of them to persons 20 years of age and under. Detailed statistics for Marathon shopping centres are

found in the last page of the statistics provided by CIPREC which are contained in Appendix 8.

Markborough Properties Ltd. operates the Woodside Square Shopping Centre in Agincourt, which comprises 60 retail stores and ten offices on the second level. Security is provided by First Protection, which has devised a bar notice stipulating varying lengths of time, depending upon the seriousness of the misconduct in question. Approximately three such notices are issued per month, most of them to elementary and high school students from nearby schools, usually for pushing, yelling or abusive language. Loitering is permitted, with the exception of the food court area, where members of the public are moved along if they are not eating and the seats are required for customers.

Trilea Centres Inc. is a public real estate company which operates six shopping centres in the Metropolitan Toronto area. The statistics concerning these properties are found in the second page of CIPREC's statistical information in Appendix 8. Trilea's figures show annual traffic counts of over 38 million customers and 145 bar notices. Of the 145 individuals, 31 were subsequently charged upon their return to the respective properties. In at least two cases, individuals were charged on two and three occasions. Trilea was not aware whether convictions had resulted from these charges under the T.P.A. The reason designated "truancy" for banning an individual related

to a parent calling the shopping centre to request a ban notice in order to prevent a child from missing school or misusing his or her allowance.

Moving to publicly-used properties other than shopping centres, the Canadian National Exhibition noted that about 125,000 persons enter the grounds of Exhibition Place daily during the three week period of the Exhibition. About 15 ban notices are issued and one person arrested on an average day by the Metropolitan Toronto Police Force, who administer the T.P.A. A Metropolitan Toronto by-law empowers a peace officer or an employee of Exhibition Place to order a person to desist from specified behaviours and to leave for one day. An Exhibition Stadium By-law covers improper behaviour within the stadium; for the Blue Jays and Argonauts, the significant provision is the one prohibiting entry onto the field, and imposing a $1,000 fine. The Toronto Blue Jays indicated that this was the problem which resulted in their most frequent use of the T.P.A.

The Toronto Transit Commission transports about 1.5 million passengers per day, or 432 million each year. The TTC is assisted in its goal of providing safe, clean and reliable transportation by its by-law No. 1 pursuant to the Railways Act. By-law No. 1 regulates passenger conduct by prohibiting certain offences such as loitering, fare evasion and smoking on transit property and vehicles. The by-law is posted on

all vehicles and at station entrances in the form of a public notice. The TTC considers by-law offences to be "prohibited activities" under subparagraph 2(1)(a)(ii) of the T.P.A., and can therefore deal with offensive activities through a by-law charge or through a caution or trespass charge under the T.P.A.

In 1985, 1,339 persons were orally cautioned by transit investigators, and 307 persons were charged, 114 of them under the T.P.A. Of these 114 trespassing charges, 34 persons were under 18 years of age, and 75 persons were caucasian. The available figures for January 1 to September 30, 1986 are as follows:

Trespass Charges	Total	By Police	By TTC
Fail to leave when directed -	33	30	3
Engage in prohibited activity -	49	49	-
Enter prohibited premises -	10	10	-
TOTAL	92	89	3

Trespass Cautions (all by TTC)

Fail to leave when directed -	8
Engage in prohibited activity -	20
Enter prohibited premises -	14
TOTAL	42

The figures for both years cover only incidents in which TTC Security staff were involved.

The present By-law No. 1 and its proposed replacement, setting out prohibited behaviours, are reproduced at Appendix 11.

Seneca College of Applied Arts and Technology indicated that the T.P.A. and criminal charges were invoked through the assistance of the police where men had engaged in harassing or threatening conduct towards staff or residents of a 400 room residence for female students. The University of Toronto indicated that it viewed its grounds as open to the public, but the T.P.A. was used to deal with transients and thieves. The University issued 39 trespass notices in 1985 and 72 in 1986 in a form which I have reproduced in Appendix 12. In each year, 18 persons were charged under the T.P.A. In addition, members of the University of Toronto Police have asked transients to move on about 250 to 300 occasions per year.

The Hotel Security Chiefs' Association, representing the security staffs of seventeen hotels in Metropolitan Toronto, indicated to me that a system was put in place under the Petty Trespass Act which has not changed under the T.P.A. It involves warnings, and then notices, and then finally charges to respond primarily to charges of prostitution, breaking and entering and petty theft. The in-house security staffs did not prevent visitors (even those who had been banned from hotel premises) from using passages to other buildings, although they have treated all of the privately-owned hotel property as one complex, including common areas used primarily for shopping or access purposes. The Viscount Hotel has not issued notices under the T.P.A., but has simply removed the visitors who misbehaved,

and has on occasion called the police to arrest under the T.P.A.

The Retail Council of Canada has about 2,200 members including national supermarket, department store and specialist chains as well as a cross-section of independent retailers in most major commodities. Its members represent about 70% of Canada's retail store volume. Its Loss Prevention Committee indicated that members apply the T.P.A. in a virtually uniform fashion in cases of criminal or quasi-criminal conduct within stores. In 99% of all instances, the misconduct relates to alleged shoplifting or fraud (by far the most frequent occurences) or on occasion, damage to property or use of drugs or alcohol. The automatic procedure in such circumstances is to charge the individual under the T.P.A. and to issue a permanent ban notice. Notices may be withdrawn if the visitor is acquitted of the substantive offence or if a request for reconsideration of the ban is addressed to the store manager.

Statistics related to ban notices and charges under the T.P.A. are not commonly recorded by retailers; however, five major companies with stores across Ontario tabulated the following data for 1985 and the first ten months of 1986: 12,374 persons were charged under the T.P.A. as being alleged to have committed a criminal offence, and 12,366 bar notices were issued in the circumstances. The Retail Council explained that the automatic ban and charge procedure derives from the fact

that Canadian retailers lose over $1 billion due to shoplifting, and that given profit margins, $400 to $500 of sales are necessary to make up for the theft of a $3 item. The T.P.A. is thus used as a safeguard against repetition of theft or fraud, and is seldom invoked in cases of loitering within stores.

The Metropolitan Toronto Police Force supplied me with extensive information concerning charges laid under the T.P.A. over the last four years. Two representatives of the Force from 31 Division provided me with some insight into the problems of the Jane-Finch area, in part through a guided tour of the district one cold Friday night. I was supplied with profiles of persons charged by 31 Division officers which showed the seriousness of the criminal offenses which residents and store and mall owners have to contend with today. For this reason, many stores and public housing facilities have given written authorizations to the Force to act as their agents under the T.P.A. These documents permit police officers to warn, ban or arrest visitors to such properties without seeking the instructions of the property occupiers. The Toronto-wide statistics show that after dropping off in 1985, the number of charges increased significantly in 1986, and that the charges are largely concentrated in five areas of the Metropolitan area, including the downtown core, Jane-Finch and Regent Park. I have reproduced the statistics provided to me as Appendix 13.

The Ontario Provincial Police, in response to my letter of invitation to make submissions, canvassed its District and Detachment Commanders across Ontario and compiled extensive and interesting statistical information, isolating the incidents of trespassing charges by age, sex, season of the year, day of the week, time of day and area of the province. I have attached the O.P.P.'s computer analysis as Appendix 14. As the Commissioner noted, most of the O.P.P.'s policing responsibilities are in rural areas, and the examples of properties where the T.P.A. is invoked include many settings which are outside the scope of publicly-used property. The O.P.P. recorded charges in relation to the following locations: railroad properties; post offices; schools; hotels, bars, taverns and legions; gravel pits; arenas, parks, and recreational centres; farms and cottage property and golf courses where hunters, fishermen, cross-country skiers and drivers of snowmobiles, motorcycles and other vehicles entered without authority; beaches; and private residences. Notably absent from this list are the shopping centres and public housing properties which form the focus of T.P.A. enforcement in urban areas.

Evidence of the user groups

Once again, the positions of these parties can be summarized before I proceed to provide the details of their evidence.

First, there is a widely held perception among minority groups and young people that the T.P.A. is enforced in a discriminatory way against them. Congregating in groups is seen as acceptable for those who are white, normal or "middle class" in their appearance, but as threatening or disruptive for the young, for visible minorities, for the poor, and generally for those exhibiting an "alternative lifestyle". This perception leads to confrontation between visitors and security guards, often resulting in escalating tensions. These tensions are themselves exacerbated by the absence of any obligation on the part of security guards to give reasons for asking visitors to leave, and their frequent refusal to do so. In situations of enforcement by police officers, the perception of arbitrariness and discrimination is compounded by the fact that by acting independently as agent of a property owner or by attending at the scene to complete a citizen's arrest by the occupier, the police force is seen to be "taking sides" or "doing the bidding" of private property owners at the expense of the "less well off".

Second, these perceptions are reinforced by dozens of specific incidents of overly restrictive or discriminatory enforcement of the T.P.A. against minorities and youth. Virtually every young person, as well as the groups representing youth and minorities, cited specific incidents in which security officers, in particular, had focused on individuals or groups within

these categories, and had either "hassled" them by demanding that they move on or had peremptorily banned or arrested them, apparently without reason. The perceived injustice frequently led to verbal and/or physical confrontations, and in some cases, individuals (including those not banned) have stopped frequenting certain downtown shopping areas in spite of the lack of adequate alternatives for the amenities they provide.

Specific allegations of unduly restrictive or discriminatory enforcement of the T.P.A. were provided by some organizations which conducted research in order to prepare their presentations to this Task Force, as well as other groups and individuals who described personal experiences.

The Children's Aid Society of Metropolitan Toronto is the largest child welfare agency in North America. The substantial segment of the families which it services are economically disadvantaged; many are from visible minority communities, and most have adolescent children either at home or in its care, or living independently in the community. More frequently than for other groups, these families' living circumstances, cultural traditions and social practices place them in situations where there is a high risk that the provisions of the T.P.A. may be invoked against them by property owners or the police.

The Children's Aid Society conducted a substantial survey for this Task Force, consisting of structured interviews by social workers with a total of 33 client, staff and community groups. The list (which I have reproduced as Appendix 15) includes four sets of adolescent clients, ten groups of program staff from the Society, eleven community organizations and eight multi-cultural organizations.

Among the groups interviewed, the perception of the extent of the enforcement problem was divided evenly into two factions. About half felt that there was no problem while the rest believed that enforcement was poorly handled. Half felt youths and minorities were not discriminated against, and half believed they were. Many Children's Aid Society clients, foster parents and staff were unaware of a problem, but an equal number observed difficulties frequently.

The survey showed certain problem locations. Some shopping centres (for example, the Eaton Centre, the Hudson's Bay Centre and Gerrard Square), Metropolitan Toronto Housing Authority developments (Regent Park, Caledon Village and Birchmount/Glamorgan), public transit facilities (for example, the Kennedy subway station) and fast food restaurants (for example, McDonald's and doughnut shops) had significant problems, whereas others reported virtually none. The manner of enforcement varied widely as well, with some property owners and police officers seemingly satisfied to use

sral or written warnings, while others appeared quick to lay charges or use charging to "intimidate undesirables".

The Society found that black West Indian youths and "punk rocker street kids" seemed to experience more harassment regardless of their behaviour than did other groups. The survey concluded:

> Discrimination ... can be observed in a variety of ways:
>
> - singling out particular minority individuals or groups while ignoring dominant culture members
> - focusing on youths disproportionately over other age groups
> - choosing adolescents sporting counter-culture fashions while overlooking more conservatively dressed youths
> - identifying economically disadvantaged persons for restriction before addressing more prosperous individuals
> - administering different enforcement penalties to separate violators for similar infractions of the law.

The Race Relations Division of the Ontario Human Rights Commission informed me that over the past several years there has been an increase in concern over the administration of the T.P.A. on publicly-used property. The Race Relations Division and the Compliance Branch of the Commission have received a number of race-related complaints from minorities, alleging harrassment by security guards patrolling shopping malls. Complainants allege that the T.P.A. is administered in an arbitrary

and unfair manner by mall occupiers and their agents, resulting in discriminatory treatment and embarrassment, as well as financial loss.

The complaints have fallen into two categories. First, there have been letters in which members of the public point out the general problem but do not pursue the formal complaint procedure. For example, one letter to the Commission by a black youth stated as follows:

> On a number of occasions I have observed security guards unnecessarily harassing blacks and other visible minorities. The security guards know exactly how to provoke reaction and create a scene. South Common Mall at Erin Mills Parkway and Burnhamthorpe and Square One at Burnhamthorpe and Hurontario are two malls which seem to be upholding this Apartheid-like policy.
>
> The use of racial slurs by security guards seems to be the least of the problems which confront the visible minority community. One youth was turned away from South Common Mall and told that blacks were not allowed entrance. I particularly object to the use of a list of barred youths as an excuse for accosting and eventually arresting solely on the grounds of resemblance to those barred. Even after wrongful identification is established, the security guards force the victims to sign the list or face further confrontation with the police. In Mississauga the situation is very grim.
>
> I by no means condone loitering or misbehaviour in any form, but this wave of indiscriminate accostation and harassment must be brought to a halt.

In other cases, formal complaints have been filed with the Commission. The following is an example of such a complaint, which was settled by the Commission in the complainant's favour:

1. On or about September 17, 1985, I entered the Eaton Centre where I spent some time looking at the shops and minding my own business.

2. I became aware of a security guard following me; after a period of time, the guard asked me to leave the premises.

3. I was issued a banning notice and then charged with trespassing by the police.

4. I believe that this action was taken against me in violation of my right to freedom of movement as a Canadian citizen.

5. I specifically believe that I was thrown out because I am a Rastafarian, in contravention of my right to my religious beliefs, and because I am black.

6. I am a black male of the Rastafarian religion and believe my right to equal treatment with respect to services without discrimination has been infringed because of my race, colour, ethnic origin and creed ....

Another complaint to the Race Relations Division involved a South Asian man who, with his son, has been banned from a mall in Metropolitan Toronto. Mr. A has lived in the area for 18 years and has frequented the mall on a daily basis without incident. Mr. A was interviewed by staff of the Division to acertain details of his complaint.

> Mr. A explained that while shopping at a grocery store in the mall, he encountered another South Asian gentleman and a security guard in the midst of a discussion. As this gentleman was experiencing difficulties in expressing himself in the English language, Mr. A intervened in the conversation. Mr. A found that the gentleman was apologizing to the security guard for defying a ban. When Mr. A defended the gentleman's position, he too was banned. Since Mr. A does his grocery shopping and banking, visits his doctor and walks through the mall property to catch a bus to work, he defied the ban. Mr. A has been issued a number of tickets for defying the ban which he has taken to court and successfully challenged, although at a considerable financial cost because of the days he had to take off work to go to court. Mr. A

> explained that as he could no longer risk the financial costs associated with defying the imposed ban, he had his son collect a petition from patrons at the mall in an effort to have the ban removed. For his participation in collecting the petition, his son was also banned. Mr. A indicated that his son has also defied the ban and currently has tickets totalling over $2,000. Mr. A indicated that about 200 people from the South Asian community in the area have offered to accompany him to the mall in protest. As he does not want a confrontation, he has so far refused their offer.

Mr. A's complaint has yet to be resolved.

In preparing its submission to this Task Force, the Commission retained consultants to conduct a survey at South Common Mall in September, 1986. Three-quarters of those interviewed were non-white and four-fifths were youths. The Commission noted that the survey was not a scientific study, but merely "an exercise to obtain some general impressions on the issue".

The major concerns cited by those who were interviewed were as follows:

(a) Black youths are harassed more frequently by security guards than are white youths.

(b) Security guards are unfriendly, authoritarian, and often overzealous.

(c) Ethnic youths are stereotyped, especially if they are in a group. They are referred to as "gangs" by security guards.

(d) Security guards manhandle black youths more than any other youths.

(e) Security guards become very paranoid when large numbers of youths turn out on Tuesday nights when movies are shown at a discount rate.

At a racial sensitization workshop conducted by the Commission, the guards identified black youths as more problematic because "They are louder and tend to make macho remarks to women walking in the malls" (This workshop will be referred to in more detail below.) This perception, as well as the reference to groups of young black people as "black gangs" was repeated to me in my meetings with some shopping centre managers.

The Council on Race Relations and Policing has been in existence since 1976, and is funded by the Solicitor General of Ontario and Metropolitan Toronto Council. Its members include the Urban Alliance on Race Relations, the Social Planning Council, community legal clinics, Metropolitan Toronto Police Force, the Ontario Human Rights Commission, the Public Complaints Commissioner, the Federal Solicitor General, the Ontario Ombudsman, the Metropolitan Toronto Housing Authority and others. Three members of its six person Executive Committee are members of the Metropolitan Toronto Police Force.

The Council identified the need for public education on "responsible hanging out", particularly for the benefit of visible minority youth, and a sub-committee of the Council is preparing an educational videotape on "Hanging Out" which addresses issues arising from the T.P.A. and other applicable legislation. The Council stated in its written submission:

> Youths who hang around outside stores, in and around eating areas, and in other such places in malls and plazas, are often perceived by store-owners to cause obstruction to other shoppers, which in turn hurts their business. Some store-owners are known to bar youths from entering their stores.
>
> In such circumstances, the affected store-owner would call the security guard to complain about the misconduct of the youth or youths in question. In some instances, the security guard is reasonably informative and warns the youths politely and firmly - but does not call the police. In other instances, security guards call the police without any explanation. The youth in question feels "I'm not doing anything wrong. Why is he/she asking me to leave?"

After recording the common misunderstanding that such places are "public" and that there must be a reason for ejection, the Council stated that there was a "widely held perception" of "discrimination in the enforcement of the law":

> For example, a common perception is that when an older and/or a white person hangs out in public places such as shopping malls, it is not seen as a a problem, whereas when a young and/or non-white person does it, the T.P.A. is used. In some shopping malls and plazas, security guards and/or police officers are sometimes perceived to "watch" youth as though anticipating problems.

Jane-Finch Community Legal Services is a legal clinic located in the Norfinch Shopping Centre in the Downsview area of Metropolitan Toronto, and it serves a low income clientele under its mandate from the Ontario Legal Aid Plan. The clinic informed me that the T.P.A. has been a source of concern to residents in the Jane-Finch community over the years. Its use in the early 1980's led to the perception of discriminatory application against minority youth in the neighbourhood.

The bad feelings engendered by prosecutions under the T.P.A. were aggravated by the involvement of the police, who were seen by some as agents of the property owners. The police, for their part, believed that they were merely doing their job in enforcing the legislation. These tensions abated somewhat in subsequent years, although there have been recent flare-ups during the currency of this Task Force.

Most of the charges under the T.P.A. which have come to the clinic's attention have been against black youths, and almost all defendants have been convicted, although those who defended their cases have often obtained lenient sentences such as discharges. The black community is by no means the only ethnic group, or even the largest one in the Jane-Finch area.

Parkdale Community Legal Services is a community legal clinic funded by the Ontario Legal Aid Plan and Osgoode Hall Law School. Parkdale's experience has been that the T.P.A. has had a disproportionate impact on the young, the poor and the disabled members of the community. Major shopping malls and other publicly-used property provide a comfortable place to pass time, either alone or with a friend, and major shopping malls, in particular, are a "magnet" to young people across Metropolitan Toronto. Parkdale's clients include young people who are moved along and threatened with arrest by the police in local parks.

Parkdale also receives many complaints of arbitrary or discriminatory enforcement from young people who have been banned from or arrested in major downtown Toronto malls. The clinic defended one student from SEED School, which is located across the street from College Park, a major enclosed shopping centre with connections to the subway and to the Provincial Court. It also contains the only low-cost food outlets in close proximity to the school, and so it has been frequented by students at lunch.

I was informed that the SEED student in this case was told by a security guard to remove his foot from a chair, which he did, but he nevertheless was arrested fifteen seconds later. The student refused to leave, arguing that he had not finished his lunch, which he had purchased on the premises. A verbal confrontation ensued, and physical violence followed. According to the student, his throat was held and his fingers were "stamped on" by the security officer. Upon his arrest, the police were called, and in spite of protests by the student and his friends, he was arrested and charged under the P.T.A. At trial, the student was acquitted on the basis that he had not been informed upon detention of his right to counsel. Parkdale reported that many such incidents involving physical altercations have taken place at the same mall.

The situation involving the arrest of the SEED student was one of the few in which I was able to obtain

an independent eye witness account, which confirmed the student's version of the events. I received a written submission from SEED, which is an alternative school operated by the Toronto Board of Education, and met with several teachers and students. Both groups reported harrassment by security guards in several malls of visitors who exhibited an "alternative" lifestyle. This was especially true of young people, but included some teachers from the SEED School, who related their experiences as well.

I was informed that half of SEED School's students have been banned from College Park, and that this half generally coincides with the people who look "different". Most students now avoid College Park, although it provides one of the few nearby places where they can afford to eat lunch.

At other downtown malls and restaurants, including the Eaton Centre, the Yonge-Eglinton Centre and St. Lawrence Market, SEED students report being asked to leave eating areas. They said that better-dressed and older business people are not approached at the same locations even though they are no longer eating or are "nursing a cup of coffee".

The students reported frequent occurrences in which after being told to leave and indicating that they would comply, young people were given ban notices and/or arrested for failing to move quickly enough. On other

occasions, students said that they were approached while using malls as access routes to the subways and were issued ban notices. In addition, many instances were cited to me in which young people who were sitting together in common areas (for example, around a fountain) were told to get up and leave. In the circumstances as related to me, they did not appear to be obstructing pedestrian traffic or otherwise interfering with the operations of the respective malls.

SEED School also asserted that their conclusions concerning arbitrary and discriminatory enforcement of the T.P.A. are confirmed by students who have been employed in malls.

> We have been aware of, and even privy to the informal agreement which exists between shop owners to rid the premises of so-called undesirable members of the public. When the individuals, who display any indication of poverty, such as "shabby" clothing enter the malls, employees have been told to phone for the security staff.

Justice for Children, a Legal Aid Clinic, sponsors an Advisory Committee which includes several young people. At a meeting with this Committee, I was told of a number of personal experiences which followed the same pattern as those related to me by the SEED students. Again, young people claimed that they were singled out for harrassment in the form of abusive language, demands for their names and the application of force in circumstances where they were simply talking

together in a group, even though business people were acting in a loud and boisterous manner nearby.

One incident at College Park involved a security guard touching a female student's breasts; when her boyfriend protested, he was physically restrained by the guard. A black teenager stated that she simply avoided going to some malls such as the Eaton Centre and Gerrard Square without her mother because of the "hassles" she experienced and had seen. She reported that her brother was verbally harassed by a security officer because as the officer put it, "You aren't shopping". It was reported that the incident ended when the young man pulled out his wallet and demonstrated that he had money.

I was told by one young black woman that by chance, she sat down in a streetcar next to a bunch of "rowdy kids" who were also black. The driver asked the whole group to leave; the woman refused, saying that she had nothing to do with the rest. The driver left his vehicle to contact someone, and later returned and allowed her to stay. The same woman reported that she had been approached by a security guard in a mall who required her to leave in spite of no apparent misconduct on her part, and in doing so, asked her if she was Jamaican.

The Advisory Committee felt that security guards "harassed" people in places frequented by the

public for three reasons: (1) prejudice; (2) visitors' looks; and (3) security guards are bored. To these young people physical appearance, particularly clothing is all-important: they and their friends are "moved along" or removed when they "look like a slob". Committee members felt that owners and their security staff are very concerned about maintaining a proper image, and some lifestyles and behaviour, although inoffensive, do not fit this image.

Similar incidents and perceptions were recounted to me when I met with the student assembly at the West End Alternative School and with a group of young people at the Scadding Court Community Centre. Major trouble spots for alleged harassment were stated to be Gerrard Square, the Eaton Centre, College Park and Dufferin Mall. One incident at Dufferin Mall was stated to involve three security guards beating up a member of the public. A young man said that he tried to break up the fight, and a security guard told him to leave. He did so, but returned later the same day with two friends. A security guard pointed him out saying "that's the guy", and issued a bar notice to him alone.

Numerous incidents of violence were said to accompany the removal of persons who were sitting in food areas of shopping malls without purchases in front of them. I was told that older people - in their forties or fifties - were permitted to sit nearby in similar circumstances. At the Eaton Centre, three young

men said that they were followed by a security guard as they strolled through the mall with "an hour to kill" before the start of a movie for which they had bought tickets. This continued until they reached the movie line up, at which point the guard told them that since they were not shopping, he would have to ask them to leave, and not to return to the complex.

I also received submissions from a number of lawyers who related the experiences of individual clients, and from individuals themselves, concerning the matter in which the T.P.A. had been enforced. These accounts followed the familiar pattern of young people, visible minorities and "poorly" dressed individuals being asked to move or to leave restaurants and shopping malls; the perception on the part of these individuals that because they were "not doing anything wrong", and were not told that they were, they were in fact being harassed; frustration and questioning resulting in verbal and sometimes physical exchanges; and some trespass convictions and other acquittals on technical grounds. One new element in meeting with these individuals was the perception that "looking gay" is viewed as a reason for harassment by security guards.

I have described the perception by users that the owners and their security guards consider groups of people "hanging out" as threatening or as transformed into "gangs" by virtue of their youth, their clothing or their race. This perception was confirmed in my

meetings with owners of some malls. A couple of owner representatives adopted this interpretation of "threat" themselves; more importantly, many owner representatives said that while it was not their view, it is the view of a majority of their customers, and their business interests demand that this majority be protected from unsettling or disruptive influences in order to maintain a proper shopping environment.

Conclusions

It is this last element - the perceived fears and preferences of the "average" user of publicly-used property - which links and to a large extent explains the two accounts detailed above by the owner and user groups, which at first appear to be irreconcilable. On closer inspection, I am satisfied that the two sets of submissions are not inconsistent, but in fact fit together rather well. This is so for a number of reasons.

First, the two accounts represent descriptions of different events. The owners describe their policies on application of the T.P.A., and their instructions to their agents to enforce the Act. The users describe the implementation of the T.P.A. on the "shop floor". The present Act confers virtually absolute discretion on the occupier, a fact which is known to all owners and their agents. That discretion is exercised on a day to day basis toward a principal aim of commercial self-interest, a goal which includes as a prominent element,

good community relations and the maximization of public attractiveness. The existence of turmoil or discomfort, or threats to the average or "majority" members of the public obviously militates against the goal of the enterprise, and the T.P.A. imposes such a low threshold (indeed a zero threshold) of disruption to a commercial enterprise that it is inevitable that situations which do not constitute real threats, or which should be within society's tolerance in a publicly-used place, are reason enough for action under the T.P.A. Action of this kind will, almost by definition, have its greatest impact on those who are farthest from the majority group in status, appearance or behaviour: the young, the poor and the visible minorities.

The statistics cited by the owner groups do not conflict with this conclusion. The vast numbers which I learned from "traffic counts" provide eloquent confirmation of the public importance of such properties in terms of their usage by our population today. The figures concerning usage of the T.P.A. do not negate the evidence of overly restrictive or discriminatory application. At most, if they corresponded to the incidents cited by the users, the owners' figures would show that a small minority of visitors to publicly-used property were being excluded or arrested improperly. This empirical conclusion would not be surprising; no one has suggested that the T.P.A. is having a direct impact, much less an improper impact, on a majority or

large minority of the population in this statistical sense.

But the statistics which I detailed above do not relate directly to incidents of the type described by the users. Records have not been kept of every person who is asked by a security guard to move on or "break up". Where a bar notice has been issued, it usually does not state a reason, and there is no requirement that it do so under the present law. Where a reason for exclusion is recorded, the notation usually refers to a criminal or quasi-criminal offence having been allegedly committed, and I have no reason to question these records. A large proportion of indications of this kind, however, point simply to "loitering" or "suspicious activity", in circumstances where, from information provided to me, no offence other than trespassing is alleged or prosecuted. These statistics, quite understandably, do not refer to manner of dress or the apparent threat represented by a "gang". Finally, when a person is charged and arrested, no activity on the individual's part needs to be alleged other than his or her status of being there (in most cases) or engaging in an activity prohibited by prior notice.

The evidence which I received from the users is anectodal, but in my view, reliable. The users' evidence is difficult to correlate to the owners' statistical data, but co-exists with it. Statistical

or anecdotal information regarding the frequency and nature of such incidents simply does not exist in any form which would permit me to attach precise numbers or categorize the incidents with any confidence. Indeed, it was not my role to re-try cases which have been brought before the courts or the Human Rights Commission, although I read a number of court transcripts and had the benefit of the experience of the user groups I have cited above.

The absence of a compilation of statistics of "unduly restrictive or discriminatory enforcement" of the T.P.A. is not surprising, since this aspect is simply irrelevant to the "status" offence of trespass which has been perpetuated in the T.P.A. Moreover, on the basis of the consistent evidence that I heard, such a listing would undoubtedly be unreliable, since minority groups and young people do not frequently invoke traditional channels of reporting and complaint in response to exclusion from publicly-used properties. On the contrary, one of the problems in this area is their reluctance or inability to confront "authority figures" by defending charges under the T.P.A.

The enforcers of the T.P.A.

As I suggested above, there was a noticeable lack of evidence from the owner group concerning enforcement practices on the "shop floor". For the most part, I heard about policies from senior corporate management. From my inquiries, it appears that there is

virtually no written communication of specific policies, objectives and procedures from senior management to security staff in publicly-used properties. Where there is communciation, it consists largely of general corporate objectives of the kind which I described earlier as adequate to comply with the T.P.A., but inadequate to prevent arbitrary or discriminatory enforcement of the Act. In other words, instruction quite understandably appears to concentrate on corporate and community image and the need to provide a secure and controlled environment. From the submissions which I received, it was a rare case indeed where procedures to implement the "graduated response" under the T.P.A. were regulated in any way; this again can easily be traced to the fact that the T.P.A. does not require the graduated response which was described by the owners.

Another reason for the absence of close regulation of enforcement practices is the lack of clarity of policy, even at the corporate level. Owners have, not surprisingly, relied upon the virtually absolute discretion provided to them by the T.P.A. Within this legislative scheme, the principal way in which one can go wrong is not by unwarranted exclusion of "undesirables", but rather by offending the majority of users or by provoking complaints of one kind or another. For this reason, the formulation of policy has been lax.

For example, I asked most shopping centre owners the fairly simple question: If a young man sits down on a bench in the common area of a mall, and does nothing more, will he be asked to leave, and if so when? In most cases I received no clear answer. In one case, I was told that the response at a major shopping mall would depend on whether the man was reading a book or not; if he was seated with a book, he would not be questioned or asked to move. I asked what would happen if he put his book down. I was told that was quite all right; he would not be asked to leave. What if he had no book to start with? That was all right too. This brought us full circle to the original question, but a different answer.

Again, this lack of clear policy simply reflects the fact that the present T.P.A. does not demand it. Such questions can be and have been left to the discretion of the individual guard, and I have no doubt that such questions are answered by the human beings who are involved in individual cases by evaluation of factors such as physical appearance and acceptabilty to the widest group of users.

This conclusion is reinforced by the findings of a racial sensitization workshop for security guards which was conducted by the Compliance and Conciliation Branch of the Ontario Human Rights Commission in September, 1986 and was attended by the consultant who conducted the shopping mall survey which I referred to

earlier. During the workshop, the security guards identified their three main functions:

1. To protect private property.

   Security guards unequivocally maintained that shopping malls are private properties and tenants of these malls have unquestionable rights to security. They indicated that their duty is to accommodate the wishes of the mall occupiers as prescribed by the Act. For instance, they argued that if a store-owner called to have a group of people removed from the mall, whether or not the group was being disruptive, the store-owner is entitled to have his/her wishes carried out.

2. To prevent loitering.

   The prevention of loitering especially if it occurred directly in front of a store is of primary importance to the security guards. They believe that legitimate shoppers are intimidated by groups of people who are loitering and, in turn will go elsewhere to shop. This results in significant financial losses for mall occupiers. The security guards further explained that there need only be a perception of loitering (either by themselves and/or mall occupiers) for them to ask a person(s) to either move or face a penalty.

3. To keep people moving.

   Although this function was identified as being very important, it was not specified how or when this intervention was to occur. It appears that this function is closely related to that of preventing loitering.

These concerns are exacerbated by the fact that in spite of numerous requests, I received no evidence that in-house or contract security guards receive training in human rights, multi-culturalism or tolerance of varying lifestyles. Once again, there is nothing in the T.P.A. that demands it. The necessity for such training stems from the corporate social

responsibilty that accompanies the significant role that publicly-used properties have obtained in Ontario today and the benefits which they derive from that role. The need for training of this kind exists among those designated "security guards", who often work for low wages and suffer from significant turnover. The need is, if anything, even more acute in the case of managers, clerks and other administrative staff for whom the removal of entrants is a minor part of their functions. In these cases, occupiers often have no instruction whatsoever in the use of the T.P.A. beyond the knowledge that it accords an almost absolute discretion to remove visitors.

The Commission concluded that:

> The security guards maintained that their primary duty is to enforce the Act in a manner that best addresses the needs and the desires of the mall occupiers. In addition, they argue that not only must they do their jobs well, but it is necessary for them to be perceived by mall occupiers and patrons as doing a good job. The protection of their image is a very important aspect of their work. In achieving these goals, they argue that their actions are appropriate and necessary given the situations that they must deal with.

CHAPTER SIX

CONCLUSIONS: A LEGAL REGIME FOR TRESPASS TO PUBLICLY-USED PROPERTY

I will now summarize my responses to the seven arguments which were put forward by the owner groups against modification of the T.P.A. In each case, the details of the evidence and analysis which I rely upon are found in earlier chapters of this report.

1. Private Ownership

The private ownership of most of the publicly-used properties under consideration here is not, as it was often put to me, a conclusion in itself. It is rather one factor to be considered in determining the proper balance of public and private interests which must underlie any legislative change. As a "record of values", the law must recognize, as Chief Justice Freedman did, that publicly-used property is "private property with a difference", and as Chief Justice Laskin stated, "there cannot be an 'all or nothing' approach". Moreover, it is proper to "single out" publicly-used property for a separate trespass regime and, in view of its minimal privacy interests; its influential role in determining lifestyles and municipal development; the significant public interest in informal gathering places; and the present expenditures by the state through its police and court systems in protecting such privately-owned property.

Because of public use, private owners are in the best position to distribute and pass on any additional maintenance and insurance costs which might result from a liberalized public access scheme.

2. Avoiding turmoil and commotion

A distinction must be made between "turmoil and commotion" which represents a disruption or threat to the operation of the property, and "turmoil and commotion" which resides in the perceived fears, concerns and perhaps prejudices of average or valued customers. In the former case, such as assault, theft or drug dealing, effective sanctions must be employed; in the latter, greater tolerance must be exhibited.

3. Low incidence of enforcement

The low proportion of T.P.A. enforcement in relation to the vast numbers of visitors to publicly-used property neither confirms nor denies the evidence of overly restrictive and discriminatory application of the Act. Proportionate figures must be assessed in light of the fact that trespassing is one of the leading offences among urban young people; one Toronto youth services agency estimated that 90% of its clients had been charged with trespassing at one time or another. Moreover, relatively infrequent use of the T.P.A. is a two-edged sword: it indicates no pressing

need to retain the present legal regime, particularly in light of the opportunity for and evidence of abuse, and the existence of alternatives.

4. Avoiding more serious charges

The evidence indicates that, far from avoiding escalation, the T.P.A. is a cause of it. The disturbing gap between community expectations and the law concerning the rights of visitors to publicly-used property frequently results in frustration and verbal altercations between visitors and security guards, police officers and managers. The visitor's refusal to leave and the guard's refusal to give a reason lead inexorably to physical confrontation in the form of arrest, detention and removal. This tendency is particularly troubling in light of the frequent lack of training or sensitivity on the part of the owner's agent. For police officers as well, there is the unsettling reality that under the T.P.A., they must "take sides" with the owner. Thus, trespass charges often accompany or are overtaken by more serious charges such as assault and obstruction of justice.

Finally, it is not correct that a trespass conviction is "minor matter". Apart from the fine, the charge brands young people, in particular, in what is essentially a private dispute over a perceived public right.

5. Avoiding police in private domains

Simply put, the scheme of the T.P.A. does no such thing. Every charge under the T.P.A. entails an arrest and the intervention of a police officer. In many "hot spots", such as the Jane-Finch Plaza, off-duty policemen are hired on contract to serve as security guards, and they patrol the premises in police uniform. Moreover, even where security staff are supplied in-house or are contracted out, the police have been called in on numerous occasions to patrol publicly-used property, where circumstances warranted their intervention on an ongoing basis.

6. Inadequacy of alternative charges

The concerns cited here included the inability of the police force to intervene on private property; the overtaxed criminal justice system; and the inability of the police, for example, to obtain drug convictions. On all of these points, which were collateral to the main thrust of this Task Force, no evidence was presented, and I am in no position to assess the correctness of these perceptions.

In my view, however, the perceived inadequacies of the provincial justice system provide no justification for the substitution of a private justice system, open only to those who own private property. It concerns me gravely to hear, for example,

that young people are being ticketed for trespass because they cannot be convicted for drug trafficking. Either they are committing the crime of drug trafficking (or some lesser disruptive activity) or they are not; if they are committing no act that deserves a sanction of some kind (criminal or otherwise), they should not be harassed and charged with trespass because of unspecified "suspicious" activity. Thus, in my view, this owners' argument reflects an improper motivation. In any event, the use of the T.P.A. as an alternative sanction can at most achieve the effect of moving such activity to publicly-owned property, where I presume that the same problems of enforcement of more serious offences will exist. This too, I view as an unmeritorious goal.

7. Existence of alternatives to statutory amendment

The Metropolitan Toronto Police Force asserted that Ontario residents have access to one or more of an array of options short of legislative amendment:

- meet the charge in Provincial Offences Court (including the appeal process);
- appeal informally to the good sense of a superior authority, i.e. the actual owner of a property when the offending "occupier" is merely an agent, e.g. a security guard;
- invoke Section 7 of the Canadian Charter of Rights and Freedoms in cases of unlawful arrest;
- stigmatize and dissuade the offending "occupier" by exposing his activity to the

public via the media, elected representatives, etc.;

- seek redress under the provisions of the Human Rights Code;
- enter litigation to seek a civil settlement;
- make a complaint under the Metropolitan Toronto Police Force Complaints Act, if the offender is a police officer with this Force.

Unfortunately, all of these options fall victim to three problems which severely limit their effectiveness.

First, each of them places the onus for complaint in an individual case upon the person who has been the victim of unduly restrictive or discriminatory enforcement. As I indicated earlier, persons charged under the T.P.A. are unlikely to invoke legal remedies or to risk further clashes with the authorities. Moreover, in many cases, it is simply unreasonable to expect anyone, even an affluent and legally sophisticated person, to undertake some of the remedies listed such as a Charter or civil action or a Human Rights Code complaint. In most cases, visitors do not respond to removal from publicly-used property by issuing a Statement of Claim or filling out a lengthy complaint form and undertaking a costly and time-consuming process spanning three or four years.

Second, most of the listed avenues of redress may provide no remedy at all. For example, it is not at all clear that removal from the common areas of a shopping mall on a prohibited ground constitutes a

denial of the "right to equal treatment with respect to services, goods and facilities" under section 1 of the Human Rights Code. In addition, neither age under 18, nor lifestyle, nor appearance is a prohibited ground of discrimination under the Human Rights Code. Problems of proof in tying a removal to a prohibited ground are formidable.

Third, the reality is that the standard "unduly restrictive or discriminatory" removal, ban or charge under the T.P.A. does not violate any of the statutes or engage any of the remedies listed by the Metropolitan Police. These remedies cure symptoms, and the ailment lies in the legislation itself. Successful recourse to any or all of the quoted remedies will not alter the familiar sequence: that our youth and minorities need to and will "hang out" in publicly-used properties; the owners of such properties will continue to attract them and will benefit by their presence; yet the owners will retain a right to exclude certain persons on the basis of a perception that the majority of their customers would prefer them excluded, or on no basis at all; and inflamed passions on both sides will culminate in symptoms such as assaults, false arrests and Charter violations, which will leave ejected visitors with the list of options open to them once more. In my view, legislative amendment is required in order to bring the ancient law of trespass in line with modern realities, and not simply minimize the consequences of that anachronism.

I therefore propose that the Trespass to Property Act be amended in a number of ways.

A requirement of cause

At a minimum, the virtually absolute discretion accorded to occupiers of publicly-used property must be limited by providing for a definition of misconduct which is sufficient to justify exclusion or prosecution of a visitor. Every representative of the owner groups stated that this is the guiding principle under the present Act: no one should be subject to removal from publicly-used property because of the mere status of being there, and removal is justified only where a visitor misbehaves in a way which interferes with the operation of the enterprise and does not cease such misbehaviour after a warning.

While a criterion of "cause for removal" was stated in all cases to prevail, there was division among the owner groups in response to my suggestion that such a requirement be written into the legislation. Where there was resistance, however, it was based not on principle, but on the difficulty of drawing lines and defining terms, and on the sheer inconvenience of having to do so rather than exercising complete discretion. In my view, however, this complete discretion is no longer defensible, and the difficult line-drawing and definitional tasks must be undertaken.

A legal regime for publicly-used property

In my view, there are two realistic alternatives for a legal regime to govern trespass to publicly-used property. In either case, of course, such property must be exempted from the unlimited discretion on the face of the present Trespass to Property Act.

(A) Prohibition against unreasonably inconsistent use

The first alternative involves the substitution of a standard of misconduct represented by "unreasonably inconsistent use", for the present status of being found on property contrary to the occupier's wishes, as the triggering event for sanctions under the Act. While I view a specific list of prohibited behaviours as preferable in the interests of consistency and certainty, it appears from my consultations that no single list would be complete and at the same time appropriate to all forms of publicly-used property. I therefore recommend a general standard quoted, supplemented by a lengthy but illustrative list of prohibited acts, such as fighting, using foul language or shouting in a manner disturbing to others, vandalism, obstruction of pedestrian access, as well as the commission of criminal or quasi-criminal offences such as loitering, intoxication, theft, fraud, threatening, drug use or trafficking in drugs, causing a disturbance or committing a prohibited sex act.

For all publicly-used properties, the posting of prohibited conduct should be encouraged; however, the posting cannot be determinative of the unreasonableness of the behaviour. It should simply be a factor to be taken into account in assessing a defendant's guilt. Another factor which must be considered for the same purpose is the nature of the property and the extent and type of public use. I recommend that this consideration be explicitly enumerated in the legislation.

Thus, the general scheme of this regime would be as follows. A visitor who acted in a manner which is unreasonably inconsistent with the use of the premises, or who displays one of the enumerated forms of misconduct, would be liable to prosecution under the Act. In the case of most such misbehaviour, I would expect that a warning against continuation of such an act would precede any further step and would be taken into account in any subsequent prosecution in determining whether an offence was indeed committed. Persistence in such misconduct, or the commission of one of the criminal offences, would render the visitor liable to prosecution under the Act. At trial, the judge would be required to assess the misconduct alleged by the occupier in light of the circumstances such as the nature of the act; its timing and persistence; the existence of one or more warnings; the nature of public

use of the property; the degree of disruption occasioned by the defendant's conduct and the consequences for the occupier and for other members of the public; and the existence of any prior notice by way of signs or admission tickets. The terms of the signs or tickets, of course, are to be taken into account, but cannot override the basis rights of public use recognized by this alternative. In other words, the owners of publicly-used property should not be in a position to contract out of the Act.

Because of the generality of the definition of misconduct, fine distinctions need not be made between different types of publicly-used property. For the purposes of this alternative, "publicly-used" can be defined as "property to which the public is normally admitted, regardless of whether ownership is public or private".

Such a scheme would be similar in certain respects to the provisions of two state laws in the United States. The Crimes and Offenses of Pennsylvania stipulates in Section 3503(b), under the heading "Defined Trespasser":

> (1) A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by:
>
> (i) actual communication to the Act; or
>
> (ii) posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or

(iii) fencing or other enclosure manifestly designed to exclude intruders.

(2) An offense under this subsection constitutes a misdemeanor of the third degree if the offender defies an order to leave personally communicated to him by the owner of the premises or other authorized person. Otherwise it is a summary offense.

Subsection 3503(c) then lists among "defenses":

It is a defense to prosecution under this section that: ...

(2) the premises were at the time open to the members of the public and the acter complied with all lawful conditions imposed on access to or remaining in the premises ....

The principal difference between the Pennsylvania provision and my recommendation is that under the latter, the "lawfulness" of any conditions of entry would depend not only upon notification, but upon reasonableness in reference to a statutory standard and/or a listing of lawful conditions.

Another noteworthy legislative scheme is the California Penal Code, which provides:

s.602 Trespasses constituting misdemeanour; enumerations

Every person who commits a trespass by any of the following acts is guilty of a misdemeanour:

(j) Purpose to injure. Entering any lands, whether unenclosed, or enclosed by fence for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing or injuring any lawful business or occupation carried on by the owner of the land, the owner's agent or by the person in lawful possession.

...

(n) Refusal to leave private property Refusing or failing to leave land, real property, or structures belonging to or lawfully occupied by another and not open to the general public upon being requested to leave by (1) a peace officer at the request of the owner, the owner's agent, or the person in lawful possession, and upon being informed by the peace officer that he or she is acting at the request of the owner, the owner's agent, or the person in lawful possession, or (2) the owner, the owner's agent, or the person in lawful possession ...

...

(s) Entry on private property by person convicted of violent felony Entering upon private property, including contiguous land, real property, or structures thereon belonging to the same owner, whether or not generally open to the public, after having been informed by a peace officer at the request of the owner, the owner's agent or the person in lawful possession, and upon being informed by the peace officer that he or she is acting at the request of the owner, the owner's agent, or the person in lawful possession, that the property is not open to the particular person, or refusing or failing to leave the property upon being asked to leave the property in the manner provided in this subdivision.

This subdivision shall apply only to a person who has been convicted of a violent felony as specified in subdivision (c) of Section 667.5, committed upon the particular private property. A single notification or request to the person as set forth above shall be valid and enforceable under the subdivision unless and until rescinded by the owner, the owner's agent, or the person in lawful possession of the property.

Thus, the California legislation eliminates the right of exclusion from property open to the general public, except where the visitor has previously committed a

violent felony on the premises. In addition, the Penal Code creates an offence of entering property with intent to interfere with, obstruct or injure the business of the enterprise. This virtual displacement of trespass law on publicly-used property brings me to my second proposed legal regime.

(B) The town square analogy

This second alternative involves the withdrawal of trespass laws from publicly-used properties on the basis that their contemporary importance places them in the same role as the town squares and public markets in earlier years, from the standpoint of the public interest. One hundred and ten years ago, the United States Supreme Court held that private property "becomes clothed with a public interest when used in a manner to make it of public consequence". The evidence I described earlier in this report indicates that developers of publicly-used property have quite consciously and in their economic interest taken on a dominant role in contemporary recreation and social intercourse. This legal scheme would ensure that during those times when the general public is admitted, visitors would be subjected to the same norms of conduct that regulate the public square, in line with the contemporary expectations of the average entrant.

Thus, visitors to publicly-used property would be expected to conduct themselves in traversing

the "streets" and "sidewalks" of common areas in the same way as if they were pedestrians on the "real streets and sidewalks" near adjacent property. In a shopping mall, for example, visitors would be no more entitled to obstruct the entrance to a shop than they would be if they were on a city sidewalk.

An extensive legislative scheme presently applies to citizen activity in public places. The prominent components of regulation include the Criminal Code, provincial statutes of general application and legislation empowering local authorities to pass regulations and by-laws dealing with public activity on city streets, parks and other public places.

Virtually all of the substantive provisions of the Criminal Code apply to acts committed on privately-owned, publicly-used property. Narrowing the focus, however, there are several sections of the Code that enable the state to control unacceptable behaviour in such places. Part II headed "Offences Against Public Order" is important in this regard. Section 49 makes it a criminal offence to do any act with intent to break the public peace. Section 64 describes and prohibits unlawful assemblies including riots. Part II.1 defines and strictly controls the use of firearms and concealed weapons. Section 86 makes it a criminal offence to possess a weapon while attending or on the way to attend a public meeting. Section 85 prohibits carriage or possession of a weapon or an

imitation thereof "for a purpose dangerous to the public peace or for the purpose of committing an offence". Section 87 prohibits the carrying, without a permit, of a "weapon concealed".

Part IV of the Criminal Code is entitled "Sexual Offences, Public Morals and Disorderly Conduct". Section 138 defines public place to include "any place to which the public have access as of right or by invitation, expressed or implied". The Part then goes on to prohibit indecent acts and nudity in a public place. Section 171 is a comprehensive provision which has particular importance in that it prohibits many of the acts which have given rise to ban notices and prosecutions under the present T.P.A.:

> Causing disturbance, indecent exhibition, loitering, etc. - Evidence of peace officer.
>
> 171.(1) Every one who
> (a) not being in a dwelling-house causes a disturbance in or near a public place,
> (i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language,
> (ii) by being drunk, or
> (iii) by impeding or molesting other persons,
> (b) openly exposes or exhibits an indecent exhibition in a public place,
> (c) loiters in a public place and in any way obstructs persons who are there, ...
>
> is guilty of an offence punishable on summary conviction.

Section 176 prohibits a commission of a common nuisance. Section 387 of the Code then goes on to define another offence which is particularly applicable to publicly-used property, the commission of mischief:

Mischief - Punishment - Idem - Idem - Offence - Saving - Idem.

387.(1) Every one commits mischief who wilfully
(a) destroys or damages property,
(b) renders property dangerous, useless, inoperative or ineffective,
(c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property, or
(d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

(2) Every one who commits mischief that causes actual danger to life is guilty of an indictble offence and is liable to imprisonment for life.

(3) Every one who commits mischief in relation to public property is guilty of
(a) an indictable offence and is liable to imprisonment for fourteen years, or
(b) an offence punishable on summary conviction.

(4) Every one who commits mischief in relation to private property is guilty of
(a) an indictable offence and is liable to imprisonment for five years, or
(b) an offence punishable on summary conviction.

(5) Every one who wilfully does an act or wilfully omits to do an act that is his duty to do is, if that act or ommission is likely to constitute mischief causing actual danger to life, or to constitute mischief in relation to public property or private property, guilty of
(a) an indictable offence and is liable to imprisonment for five years, or
(b) an offence punishble on summary conviction.

It is clear that there is ample scope in the criminal law, apart from the crimes of murder, assault, breaking and entering, and so on to protect the public and private owners from a wide range of deviant and/or dangerous behaviour. Many of the Criminal Code's provisions are directed specifically to the protection of publicly-used property. In addition the mischief and disorderly conduct provisions indirectly protect the occupier of a publicly-used place by prohibiting activity likely to disturb or offend the public.

There are two classes of provincial legislation that are relevant here. The first area concerns statutes of general application that regulate citizen activity, and the second consist of Acts which delegate authority to local bodies such as park boards and municipal governments to regulate activities within those local jurisdictions.

I will not attempt to enumerate all of the applicable provincial statutes of general application. An example, however, the Public Health Act empowers the Minister to make regulations respecting the health of persons attending a public festival. The Liquor Licence Act determines who may or may not sell and/or buy liquor, and regulates where liquor may be consumed. The Liquor License Act defines "public place" in paragraph 45(1)(a) as "a place to which the general public is invited or permitted access, whether or not for a fee".

The larger group of empowering statutes delegate authority to local bodies to make regulations governing citizen behaviour. Thus, under the Public Parks Act, the Parks Board may "pass by-laws for the use, regulation, protection and government of the parks, avenues, boulevards, and drives, the approaches thereto, and streets connected with the same ..." (subsection 11(1)). The Ontario Place Act provides in section 10:

> The Corporation, with the approval of the Lieutenant Governor in Council, may make regulations,

> (a) regulating and governing the use by the public of Ontario Place and the works and the things under the jurisdiction of the Corporation;
>
> (b) providing for the protection and preservation from damage of the property of the Corporation; ....

Similar schemes are contemplated by other statutes including the Provincial Parks Act, the St. Clair Parkway Commission Act, the St. Lawrence Parks Commission Act and the Niagara Parks Act.

The Municipal Act empowers local administrations to enact by-laws for a multitude of purposes, including the regulation of activity in public places such as parks and streets. The Municipality of Metropolitan Toronto has passed by-laws governing parks and prohibiting, for example, "boisterous, unseemly unlawful conduct", "profane, indecent or abusive language", littering, the throwing of "any stone or missile in such a manner which may cause injury or damage", the distribution of handbills and notices, and the playing of certain sports. By-law 12519 governing city streets prohibits, for example, encumbering, injuring or fouling any street, coasting and tobogganing, stone throwing and lighting of fires or firecrackers. Other sections of the by-law provide for the temporary closing of streets for "social, recreational, community and athletic purposes".

Conversely, the common law rights of the general public to make use of city sidewalks correspond,

not surprisingly, to their present uses in publicly-used property. Sidewalks are owned by municipalities in trust for the general public in order that the public may make use of them for purposes of communication, passage and re-passage or in order to gain access to or egress from adjacent properties. At common law, the sidewalks can be used for purposes other than travelling to the extent that such uses do not obstruct or interfere with the public right of passage.[43]

I conclude therefore, that present public and common law, supplemented by the delegation of additional by-law powers to municipalities to regulate privately-owned, publicly-used properties, together provide an ample legal regime for the public use of such properties. This conclusion is reinforced by the observation that this regime is, in essence, presently in effect in portions of three prominent shopping malls in this province, and is advocated by a major municipality to regulate its downtown development.

The Freiman Mall in Ottawa was built and paid for by the Hudson's Bay Company, enclosing an existing city street, and was leased on a long term basis. The

43. Ricketts v Markdale (1900) 31 O.R. 610 (Ont. C.A.); Big Point Club v Lozon [1943] O.R. 491, (Ont. H.C.); Rogers, The Law of Canadian Municipal Corportions (2nd ed.) paragraph 233, pp. 1219-1221; The Municipal Act, R.S.O. 1980, c.302, as amended, s.258.

developer was required to provide a minimum 20 foot wide pedestrian corrider through the Mall, connecting Rideau and George streets on a twenty-four hour basis. Nearby, the Rideau Transit Mall features a roofed and enclosed passageway fronting existing stores. The enclosed space serves all functions of a traditional sidewalk while offering greater comfort to pedestrians in inclement weather. It was built by public and private sector funding and is administered by a Mall Authority mandated by City Council. Security guards hired by the Mall Authority supplement police patrols. The T.P.A. is not used by the Bay or the City in the pedestrian corridor or the Transit Mall.

In the case of the Eaton Centre in Toronto, the development agreement between the City of Toronto and Cadillac Fairview included the designation of five public pedestrian walkways, which were generally intended to compensate for the closure of city streets. In addition, 40,000 square feet of "private open space accessible to the public" was required to be provided by Cadillac Fairview exclusive of pedestrian walkways which were obtained through the land exchange agreement. Once again, privately-owned property was designated as akin to a city street.

A similar situation exists in downtown Thunder Bay. When the city allowed a developer to close off a section of the city core in order to create a mall, it insisted on the sidewalk remaining open to the

public. That arrangement began about six years ago, and from my information, it appears to have worked well.

The City of North York, as part of its Downtown North York project, intends to create a vibrant downtown core on Yonge Street, north of Sheppard Avenue, focusing on the Sheppard and North York Centre subway stations. An integral feature of this project is an appealing pedestrian walkway system. Development projects and buildings to be located in Downtown North York are encouraged to provide attractive environments for the pedestrian. On the west side of Yonge Street, there is to be a surface and below-grade walkway system. On the east side, specific walkways are to be provided within each private development. These walkways are to incorporate the following features: convenience and directness, weather protection, safety and security, comfortable width and height, retail activity, attractive construction materials, clear lighting, bright colours, clear signage and landscaping.

One of the critical features of the pedestrian walkway system, according to the consultants hired by the City, is to be accessibility to the public:

> The walkway system should be designed as a part of the public realm where people feel completely within their rights to behave as they could on a public sidewalk, without any obligation to purchase anything. The walkway system is not be considered merely as a route to shopping, but as well, a route through shopping. The great advantage of the public street and sidewalk is that very quality of

> publicness. It is an environment within which the full range of human emotions, activities and attributes can be expressed since it belongs to everyone and no one. Walkways on the other hand, are seldom able to create a truly public ambience. Nonetheless, they should be designed with the full range of public activity in mind with spaces that offer the potential for more than just shopping.

To this end, the City designated the Downtown North York area as a site plan control area in June, 1985. Under Section 40 of the Planning Act, the City may require, upon redevelopment of lands located within that area, that the owner-developer provide plans showing the presence of surface and below-grade pedestrian walkways in particular locations, and the City may enter into an agreement requiring the owner-developer to install and maintain such walkways meeting the extensive specifications which I listed above.

In its submission to this Task Force, the City of North York noted the inflexibility of the common law of trespass and recommended that the Legislature should "acknowledge a valid parallel between the availability to the public of a sidewalk located on a public highway and a pedestrian passageway located in a shopping plaza or in a large private office development". For this purpose, the City advocated, in line with my second alternative legal regime, that the public at large be granted a "right rather than a privilege" to such publicly-used properties.

Design issues

Prior to receipt of the extensive North York submission in February, 1987, I spoke to a number of experts in the field of urban planning in an effort to understand whether it was feasible to facilitate the safe and free use of common areas of properties which are accessible to the public. I concluded earlier in this report that there appeared to be a number of improvements which could be undertaken, and I will now expand on this and consider some legislative issues.

Municipal architects emphasized that public control of interior public spaces is crucial and long overdue. Public control of these areas would help to better address community needs, convenience and safety. Interestingly, the prevailing theme once again was the need to design interior public spaces so as to constitute an extension of comparable exterior spaces such as sidewalks, parks and squares.

I was advised that the following issues arise with respect to the design of interior public spaces:

(a) the need for public control of such places;

(b) the need to designate such areas as unambiguous public spaces;

(c) the need to make the provisions governing the public aspects of exterior and interior public spaces the same;

(d) the need to actively consider appropriate changes to the Planning Act and/or related legislation that have impact on these issues;

(e) the critical need for action with regard to these issues to safeguard public interests, to alleviate inequities in the enforcement of the trespass law, and to enhance better police-community relations.

Ms. Zubeda Poonja, an architect-planner who is the Executive Director of the Council on Race Relations and Policing, set out for me a number of design criteria for interior public malls, and I can do no better than to quote them:

(i) Diversity

An interior public mall should cater to a diversity of users and uses to promote integration as opposed to segregation of mall population. Diversity in public spaces creates self-policing situations in which users give each other constant mutual support. The mixture of uses in a public space produces a mixture of users who enter and leave the area at different times for different reasons. As such, the design of the public space should create an intricate sequence of uses and users.

(ii) Concentration, Compactness and Order

An interior public mall should be well defined in physical terms to form a compact

space. Its boundaries should be easily understood and recognized to form a space which has a concentration of diversified activities and which appears as an important event in the shopping mall or plaza. The space and the activities it contains should be designed to create a sense of physical and social order that results in a proprietary interest and felt responsibility on part of each component of the mall population ...

(iii) Intricacy

This concept is dealt with at a great length by Jane Jacobs in her book "The Death and Life of Great American Cities". What this concept means, in a nutshell, is that a public space, namely, an interior public mall should be designed to fulfill the felt needs of the shoppers with regard to the use of space. For example, besides the reason to buy, people come to shopping malls and plazas sometimes to meet friends, sometimes to pass through to connect to other areas outside, sometimes to be entertained by events, lights, merchandise and sight of other people, sometimes in the hope of finding an acquaintance, sometimes to pause, sometimes to loiter, sometimes to browse, etc. Even the same person comes to a shopping mall at different times for different reasons. Therefore, in order to fulfill the felt needs of the public emanating from a variety of reasons why people come to shopping malls, an interior public mall should be designed to cater to a complex web of uses and users which in turn creates diversity and concentration. It should be a place where everyone who wants, finds a reason to be there.

(iv) Location

The location, purpose, function, shape, size, design and activities of an interior public mall varies from urban to suburban settings, from project to project, from circumstances to circumstances. An important characteristic of the location of an interior public mall is that it should mean and be understood to connect what is inside to what is outside and vice versa. Therefore, its location and other physical attributes are determined by what it is required to connect and achieve. . . .

In a general sense, an interior public mall should be or should grow into an area which is commonly understood to be the centre (symmetrical/asymmetrical) of a shopping mall/plaza that emerges as a climax or a

> dominant focus of the project. This space should be compact, with a concentration of activities that create diversity and intricacy.
>
> Some desirable features of a public mall could include: a wide range of seating; a raised fountain with steps going up and down that could be used as a platform for public and individual expression, music, plays, etc., a retractable roof, a clock, planters, accented lights, different surface treatments and pavings etc.

Architects and municipal lawyers whom I consulted appeared to disagree as to the scope of a municipality's power to impose intricate design features of the kind suggested by Ms. Poonja. It appears clear that such features can be required, at least to the extent that they impinge on "walkways", in a siteplanned control area. Under such circumstances, subsection 40(7) of the Planning Act permits a municipality to require the landowner to:

> (a) provide to the satisfaction of and at no expense to the municipality any or all of the following:
>
> ...
>
> 4. Walkways and walkway ramps include the surfacing thereof, and all other means of pedestrian access.
>
> ...
>
> (b) Maintain to the satisfaction of the municipality and at the sole risk and the expense of the owner any or all of the facilities or works mentioned in paragraphs ... 4 ....

Beyond walkways, and beyond site plan areas, municipal authorities were doubtful about their jurisdiction to require particular interior design elements in the public interest. Municipalities, of

course, have no powers at common law other than those explicitly stated in or necessarily intended by their enabling statutes. It is not unknown for municipalities to be delegated some measure of control over interior building elements where there is an overriding public interest, as in the Ontario Heritage Act.[44]

I recommend that municipalities be given expanded powers over the construction and design of interior spaces in publicly-used property, in line with the interests identified above.

Bar notices

It will be apparent from my earlier recommendations concerning appropriate legal regimes that I view the practice of banning visitors as indefensible when carried out on publicly-used property, given the significance of free entry to society as a whole. If conduct is offensive enough to cause disruption, the visitor should be warned by the occupier of the possible consequences, and in cases of persistent misbehaviour, one or more charges should be laid which are commensurate with the actions of the defendant. I leave open the possibility that, as with publicly-owned spaces, a bail or probation order can prevent a defendant from returning "to the scene of the crime". I also have no grave concern about a legislative provision

44. Re Toronto College Street Centre Ltd. and City of Toronto et al. (1986) 56 O.R. (2d) 522 (C.A.)

permitting a "ban" in narrow cases of specified, serious criminal misconduct, as in the California Penal Code. In general, however, the "bar notice" as it presently stands involves no judicial supervision, and places in the hands of private property-owners a disciplinary or punitive tool that can have greater impact (for example, in situations of essential services) than formal procedings and is entirely disproportionate to the status offence of trespass.

If the ability to bar individuals from entry is to be retained, I recommend that it be limited as narrowly as possible in the circumstances which would permit it, and in its effective duration. One alternative is a "cooling-off period", which would involve the unruly visitor being escorted from the premises for specified misconduct, without ex post facto review, and prevented from returning on the same day. The present system, which is unlimited in time, was acknowledged to be excessive by most parties, including the owner groups.

The delineation of publicly-used property

The scope of publicly-used property will vary depending on which of the two legal regimes described above is adopted. As I noted earlier, the first scheme has a broad definition of misconduct, which in turn permits the more general definition of "property to which the public is normally admitted". Under the second proposal, however, which depends on an analogy

to the town square, it is evident that there are types of "property to which the public is normally admitted" which do not fit the analogy, such as most stores and restaurants. They simply do not serve the same function or hold themselves out in the same way as, for example, the common areas of a shopping mall. On the other hand, they still should not be governed by an uncontrolled discretion on the part of the occupier to exclude visitors. Thus, the first proposal can stand on its own, while the second requires the specification of certain publicly-used properties, and rules to govern the remainder of such properties.

In my view, the designation of properties with sufficient social importance and relationship to the "town square" must be left to individual determinations under the second legal regime. I do not propose the creation of a new bureaucracy for this purpose. Rather, the decision should be left to those most vitally affected by it: the elected local administration, such as the municipality where the property is located. Other "property to which the public is normally admitted" should remain under the first regime, and thereby involve sanctions against a visitor only upon the commission of specified forms of misconduct.

The definition of "occupier"

Under either of the two proposed legal regimes, and indeed under the present Act, the definition of "occupier" in subsection 1(a) requires

clarification. That definition specifies that there can be more than one occupier of the same premises, and thereby creates the potential for conflict between two occupiers, where only one of them wishes to exclude or prosecute the visitor.

The problem has arisen frequently. In one case, a nineteen year old, unemployed black man received a banning notice prohibiting his entry on to certain Metropolitan Toronto Housing Authority premises in the Jane-Finch area where he had been in the habit of "hanging out" with his friends. Because of his situation, the young man was a regular client of a local youth employment service which was located in the building from which he had been banned. When he attended his appointment at the youth employment office, he was followed by the police officer who had issued the earlier banning notice. In spite of the employment counsellor's explanation that her client had an appointment and was welcome in the office, the officer issued a trespassing ticket.

I came across similar situations in shopping malls. One young man was banned from a mall, although he was employed at one of the stores, to which access was available only through the common areas of the mall, and his employer had no desire to fire him. More commonly, a person may be banned from a mall or other building where essential services such as a doctor's office, bank or courtroom is located.

The present T.P.A. requires an amendment specifying that where there is more than one occupier of the same premises, and one of the occupiers gives express permission to enter the premises for a particular activity that is controlled by that occupier, no offence is committed, provided that the person confines his or her activities to the permitted ones. Under either of my two proposed legislative schemes, of course, the problem is greatly minimized by dispensing with banning notices altogether; an occupier could only act against a visitor in the event of specified misbehaviour. It is conceivable, however, that certain behaviour could be alleged to be "unreasonably inconsistent use" by one occupier although expressly approved or sponsored by another occupier; for example, certain promotional activities.

Public housing projects

As I noted in Chapter One of this report, public housing projects are, for the most part, privately-used property like any other residential premises. In varying degrees, however, publicly-assisted housing exhibits a number of distinctive features which have led to difficulties in the application of the T.P.A.

First, more frequently than in other residential properties, public uses such as small playgrounds and the employment office referred to above

are interspersed with privately-used spaces such as apartments. Second, because of the history of public housing construction, there has tended to be a marked lack of physical space in common areas such as halls, lobbies and grounds. Third, the common areas that do exist have often not been clearly delineated or fenced so as to create unambiguous space for the private use of apartment or townhouse residents.

To address these problems, I make three recommendations. First, the definition of "occupier" should make clear that a resident and his or her visitor has permission to make use of not only the private home (such as the apartment) of the resident, but the common areas of the facility which are designed for the use of all residents.

Consideration should be given to landscaping and layout changes which make clear the delineations between public and private space so as to eliminate the confusion which has been noted by judges, the Council on Race Relations and Policing and others who are familiar with enforcement of the T.P.A. in public housing sites. I note, for example, that the Regent Park Advisory Committee on Police-Community Relations created a Subcommittee on Private Space in September, 1985 to discuss and develop proposals for landscaping and architectural redevelopment in the South Regent Park area. The Advisory Committee identified the absence of clearly defined private space within South Regent Park

as one of the factors affecting the quality of relations between police officers and community residents.

Third, I recommend that greater resources be devoted to the enforcement of the T.P.A. and the Criminal Code against "strangers" to public housing sites where unambiguously private space has been the scene of acts such as drug trafficking, vandalism and assault. I received complaints of this kind from some residents of assisted housing and passed them on to the authorities, which had apparently taken the position that they were unable to enforce the T.P.A. in these cases.

Enforcement provisions of the T.P.A.

(A) The offence notice

Paragraph 3(2)(a) of the Provincial Offences Act provides for the issuance of an offence notice indicating the set time for the alleged offence. A major omission from the notice is the fact that upon conviction and failure to pay the fine, a warrant can be issued for the defendant's arrest and imprisonment. Given the frequency of convictions ex parte, no part of the penalty, however remote, should be unknown to the defendant. I therefore recommend that the offence notice be amended so as to make clear the consequences of conviction.

(B) Jail in lieu of fine

One of the main reasons for the revision of the Provincial Offences Act was to reduce the number of occasions where a defendant risked being incarcerated in lieu of fine payment for violation of provincial offenses. In so far as the T.P.A. is concerned, I am informed that enactment of the Provincial Offences Act seems to have had little effect. The alternative of imprisonment in lieu of fine is not a provision of the T.P.A. Pursuant to section 70 of the Provincial Offences Act, a defendant persistently in default of fine payment will be made the subject of a warrant for arrest and imprisonment for six days.

As I stated earlier, many persons charged under the T.P.A. do not respond to legal proceedings at all. In my view, jail is not an appropriate response to trespass, certainly not in a situation of inability to pay a fine. I recommend that the payment of fines should be civilly enforced through section 69 of Provincial Offences Act.

TABLE OF APPENDICES

APPENDIX 1

Task Force on the Law Concerning Trespass to Publicly-Used Property as it Affects Youth and Minorities

1. Purpose:

(a) To address concerns which have been raised about the impact on minorities and youth of the applicability and enforcement of the law of trespass in relation to property frequently used by the public, such as shopping plazas and public housing sites.

(b) To determine whether the provisions of the Trespass to Property Act create the potential for unduly restrictive or discriminatory enforcement against minorities and youth, and to determine whether such enforcement is taking place.

(c) To produce a written report

(i) outlining the concerns expressed by affected groups;

(ii) analyzing the substance and extent of those concerns;

(iii) reviewing the applicable law;

(iv) proposing changes, where appropriate, to the laws of Ontario.

2. Format

The study will emphasize extensive consultation with all affectd groups, such as minority and other youth; police forces, shopping plaza and store owners, managers and security guards; public housing property managers; and community legal clinics. The study will proceed without formal hearings; information will be obtained through interviews and meetings with such affected groups.

3. Timing

(a) The task force will be appointed effective June 23, 1986 and will invite written submissions, to be filed by September 15, 1986.

(b) Interviews and meetings with affected groups will begin in September 1986.

(c) The task force report will be submitted by March 1, 1987.

APPENDIX 2

CHAPTER 511

Trespass to Property Act

Interpretation

1.—(1) In this Act,

(*a*) "occupier" includes,

(i) a person who is in physical possession of premises, or

(ii) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises,

notwithstanding that there is more than one occupier of the same premises;

(*b*) "premises" means lands and structures, or either of them, and includes,

(i) water,

(ii) ships and vessels,

(iii) trailers and portable structures designed or used for residence, business or shelter,

(iv) trains, railway cars, vehicles and aircraft, except while in operation.

School boards R.S.O. 1980, c. 129

(2) A school board has all the rights and duties of an occupier in respect of its school sites as defined in the *Education Act*. 1980, c. 15, s. 1.

Trespass an offence

2.—(1) Every person who is not acting under a right or authority conferred by law and who,

(*a*) without the express permission of the occupier, the proof of which rests on the defendant,

(i) enters on premises when entry is prohibited under this Act, or

(ii) engages in an activity on premises when the activity is prohibited under this Act; or

(*b*) does not leave the premises immediately after he is directed to do so by the occupier of the premises or a person authorized by the occupier,

is guilty of an offence and on conviction is liable to a fine of not more than $1,000.

Colour of right as a defence

(2) It is a defence to a charge under subsection (1) in respect of premises that is land that the person charged reasonably believed that he had title to or an interest in the land that entitled him to do the act complained of. 1980, c. 15, s. 2.

Prohibition of entry

3.—(1) Entry on premises may be prohibited by notice to that effect and entry is prohibited without any notice on premises,

(*a*) that is a garden, field or other land that is under cultivation, including a lawn, orchard, vineyard and premises on which trees have been planted and have not attained an average height of more than two metres and woodlots on land used primarily for agricultural purposes; or

(*b*) that is enclosed in a manner that indicates the occupier's intention to keep persons off the premises or to keep animals on the premises.

Implied permission to use approach to door

(2) There is a presumption that access for lawful purposes to the door of a building on premises by a means apparently provided and used for the purpose of access is not prohibited. 1980, c. 15, s. 3.

Limited permission

4.—(1) Where notice is given that one or more particular activities are permitted, all other activities and entry for the purpose are prohibited and any additional notice that entry is prohibited or a particular activity is prohibited on the same premises shall be construed to be for greater certainty only.

Limited prohibition

(2) Where entry on premises is not prohibited under section 3 or by notice that one or more particular activities are permitted under subsection (1), and notice is given that a particular activity is prohibited, that activity and entry for the purpose is prohibited and all other activities and entry for the purpose are not prohibited. 1980, c. 15, s. 4.

Method of giving notice

5.—(1) A notice under this Act may be given,

(*a*) orally or in writing;

(*b*) by means of signs posted so that a sign is clearly visible in daylight under normal conditions from the

approach to each ordinary point of access to the premises to which it applies; or

(*c*) by means of the marking system set out in section 7.

Substantial compliance

(2) Substantial compliance with clause (1) (*b*) or (*c*) is sufficient notice. 1980, c. 15, s. 5.

Form of sign

6.—(1) A sign naming an activity or showing a graphic representation of an activity is sufficient for the purpose of giving notice that the activity is permitted.

Idem

(2) A sign naming an activity with an oblique line drawn through the name or showing a graphic representation of an activity with an oblique line drawn through the representation is sufficient for the purpose of giving notice that the activity is prohibited. 1980, c. 15, s. 6.

Red markings

7.—(1) Red markings made and posted in accordance with subsections (3) and (4) are sufficient for the purpose of giving notice that entry on the premises is prohibited.

Yellow markings

(2) Yellow markings made and posted in accordance with subsections (3) and (4) are sufficient for the purpose of giving notice that entry is prohibited except for the purpose of certain activities and shall be deemed to be notice of the activities permitted.

Size

(3) A marking under this section shall be of such a size that a circle ten centimetres in diameter can be contained wholly within it.

Posting

(4) Markings under this section shall be so placed that a marking is clearly visible in daylight under normal conditions from the approach to each ordinary point of access to the premises to which it applies. 1980, c. 15, s. 7.

Notice applicable to part of premises

8. A notice or permission under this Act may be given in respect of any part of the premises of an occupier. 1980, c. 15, s. 8.

Arrest without warrant on premises

9.—(1) A police officer, or the occupier of premises, or a person authorized by the occupier may arrest without warrant any person he believes on reasonable and probable grounds to be on the premises in contravention of section 2.

Delivery to police officer

(2) Where the person who makes an arrest under subsection (1) is not a police officer, he shall promptly call for the assistance of a police officer and give the person arrested into the custody of the police officer.

Application of R.S.O. 1980, c. 460

(3) A police officer to whom the custody of a person is given under subsection (2) shall be deemed to have arrested the person for the purposes of the provisions of the *Provincial Offences Act* applying to his release or continued detention and bail. 1980, c. 15, s. 9.

Arrest without warrant off premises

10. Where a police officer believes on reasonable and probable grounds that a person has been in contravention of section 2 and has made fresh departure from the premises, and the person refuses to give his name and address, or there are reasonable and probable grounds to believe that the name or address given is false, the police officer may arrest the person without warrant. 1980, c. 15, s. 10.

Motor vehicles R.S.O. 1980, c. 198

11. Where an offence under this Act is committed by means of a motor vehicle, as defined in the *Highway Traffic Act*, the driver of the motor vehicle is liable to the fine provided under this Act and, where the driver is not the owner, the owner of the motor vehicle is liable to the fine provided under this Act unless the driver is convicted of the offence or, at the time the offence was committed, the motor vehicle was in the possession of a person other than the owner without the owner's consent. 1980, c. 15, s. 11.

Damage award

12.—(1) Where a person is convicted of an offence under section 2, and a person has suffered damage caused by the person convicted during the commission of the offence, the court shall, on the request of the prosecutor and with the consent of the person who suffered the damage, determine the damages and shall make a judgment for damages against the person convicted in favour of the person who suffered the damage, but no judgment shall be for an amount in excess of $1,000.

Costs of prosecution

(2) Where a prosecution under section 2 is conducted by a private prosecutor, and the defendant is convicted, unless the court is of the opinion that the prosecution was not necessary for the protection of the occupier or his interests, the court shall determine the actual costs reasonably incurred in conducting the prosecution and, notwithstanding section 61 of the *Provincial Offences Act*, shall order those costs to be paid by the defendant to the prosecutor.

Damages and costs in addition to fine

(3) A judgment for damages under subsection (1), or an award of costs under subsection (2), shall be in addition to any fine that is imposed under this Act.

Civil action

(4) A judgment for damages under subsection (1) extinguishes the right of the person in whose favour the judgment is made to

bring a civil action for damages against the person convicted arising out of the same facts.

Idem

(5) The failure to request or refusal to grant a judgment for damages under subsection (1) does not affect a right to bring a civil action for damages arising out of the same facts.

Enforcement

(6) The judgment for damages under subsection (1), and the award for costs under subsection (2), may be filed in a small claims court and shall be deemed to be a judgment or order of that court for the purposes of enforcement. 1980, c. 15, s. 12.

APPENDIX 3

WRITTEN SUBMISSIONS

Shopping Centres:

Bramalea Limited

Cadillac Fairview Shopping Centres
Submitted by Weir & Foulds, Counsel

Cambridge Leaseholds Limited

Canadian Institute of Public Real Estate Companies

Code Properties Limited

Danforth Village

Downtown Business Council Toronto Inc.

First Plazas Inc.

International Council of Shopping Centres
Submitted by Goodman and Carr, Counsel

Long Branch Shopping Plaza Association

Marathon Realty Company Limited

Markborough Properties Limited

New Toronto Business Association

North Park Holdings

The Bunston Group Limited

Trilea Centres Inc.

Vista Property Management

School Boards:

North York Board of Education

The Board of Education for the Borough of East York

The Board of Education for the City of Scarborough

The Board of Education for the City of Toronto
Submitted by Shibley, Righton & McCutcheon, Counsel

The Board of Education for the City of York

... 2

Other Property Owners:

Canadian National
Exhibition Place
Hotel Security Chiefs' Association
Ministry of Housing
Ontario Hotel & Motel Association
Retail Council of Canada
Ryerson Polytechnical Institute
Seneca College of Applied Arts and Technology
Toronto Argonaut Football Club
Toronto Blue Jays Baseball Club
Submitted by Goodman & Goodman, Counsel
Toronto Transit Commission
University of Toronto
Viscount Hotel

Police, Security Guards:

Commercial Security Association Inc.
Intercon Security Limited
Invesec Security and Investigations
Metropolitan Toronto Police
Neighbourhood Watch
Ontario Association of Chiefs of Police
Ontario Provincial Police
Seneca College of Applied Arts and Technology

Municipalities:

City of North York - Legal Department
City of Ottawa - Department of Community Development
City of Toronto - Planning & Development Department

... 3

Minority Organizations:

Council on Race Relations and Policing

Ontario Human Rights Commission

Sparroways Residents Committee

The Regent Park Advisory Committee on Police Community Relations

Youth Organizations:

Amity Residential Treatment Ltd.

Justice for Children Advisory Committee

Scadding Court Community Centre

SEED School

The Children's Aid Society of Metropolitan Toronto

West End Alternative School

Community Legal Clinics:

Jane Finch Community Legal Services

Metro Tenants Legal Services

Parkdale Community Legal Services Inc.

Justice for Children

Individuals:

Frank R. Addario

Al C. Baggs

Olivia Chow

Mirella Genco

Linda Gehrke

Najla Mady

Hon. Bob Kaplan, P.C.,Q.C.,M.P.

J. Robert Kellermann

Jack Layton - Councillor - Ward 6

... 4

Individuals: (cont'd)

Carol London

Mrs. R. A. Lucey
Mary L. MacGregor, Blaney, McMurtry, Stapells, Aarons and Watson, Counsel

Irene Pengelly

Zubeda Poonja

David Warner, MPP

Academic and Professional Assistance:

David Brown, Department of Urban Planning
McGill University

Michael Ellis, Master's Degree Candidate
Department of Urban Planning, McGill University

Michael Maclean, Department of Social Work
McGill University

David S. McRobie, MRAIC MOAQ, Sankey Partnership

Philip C. Stenning, The Centre of Criminology
University of Toronto

Peter Sijpkes, Faculty of Architecture
McGill University

APPENDIX 4

PARTICIPANTS IN CONSULTATIVE MEETINGS

October 7, 1986

BRAMALEA LIMITED

Robert J. Christie, General Manager, Operations Canada

NORTH YORK BOARD OF EDUCATION

Erik Bekker, Supervisor, Administrative Branch for Security
Ken Hills, Principal, Westview Centennial Secondary School

RETAIL COUNCIL OF CANADA

Robert G. Thomas, National Manager, Resources Protection, Sears Canada Inc.

Alex MacFarlane, Associate General Counsel, Eatons
Robert J. Herrold, Manager, Technical & Operational Affairs.

October 17, 1986

FRANK ADDARIO - Barrister & Solicitor

MRS. R. A. LUCEY

Mary McGregor, Blaney, McMurtry, Stapells, Aarons & Watson, Counsel

METROPOLITAN TORONTO POLICE

Staff Inspector Robert Kerr
Sergeant Robert Silverton

TORONTO TRANSIT COMMISSION

Norman Balfour, Lawyer
Glenn Pringle, Court Liaison Officer
J. Hearsey, Assistant Manager, Security

October 22, 1986

LINDA GEHRKE - Former staff lawyer at Jane Finch Community Legal Services

October 30, 1986

LONG BRANCH SHOPPING PLAZA ASSOCIATION

Dietmar Lein, President

METROPOLITAN TORONTO POLICE

Staff Inspector Robert Kerr
Sergeant Robert Silverton

THE CHILDREN'S AID SOCIETY OF METROPOLITAN TORONTO

Melvin W. Finlay, Executive Director
Brian O'Connor, Toronto West Branch Director
Robin Gibson, Community Worker

UNIVERSITY OF TORONTO - Centre of Criminology

Philip C. Stenning, Senior Research Associate and Co-ordinator of Graduate Studies

Susan Addario, Research Associate

October 31, 1986

COUNCIL ON RACE RELATIONS AND POLICING

Zubeda Poonja, Executive Director
Bhupendra Dhabliwalla
R. Perrin, Staff Sergeant

MARKBOROUGH PROPERTIES LIMITED

Shirley Anderberg, Manager, Woodside Square

ONTARIO PROVINCIAL POLICE

John C. Dadds, Policy & Planning Branch

TORONTO BLUE JAYS BASEBALL CLUB

Gordon I. Kirke, Goodman & Goodman, Counsel
Liza Jezioranski, Goodman & Goodman, Student-at-Law

November 4, 1986

JACK LAYTON, Councillor - Ward 6

Olivia Chow, Trustee - Ward 6

ONTARIO ASSOCIATION OF CHIEFS OF POLICE

W. I. James Harding, Chief of Police
Ian Algar, Inspector, Halton Regional Police Force

SPARROWAYS RESIDENTS COMMITTEE

Margaret Wallace
Dorothy Gillis
Mary Anne MacArthur, North East Neighbourhood Centre

THE BOARD OF EDUCATION FOR THE CITY OF YORK

B. D. Rowland, Asst. Superintendent, Student Services
R. B. Eatough, Principal, C.R.Marchant Senior School
D. L. Drew, Principal, George Harvey, C.I.

November 10, 1986

CODE PROPERTIES LIMITED

Jack Aldan, Shopping Centre Manager, Warden Woods Mall

J. ROBERT KELLERMANN, Barrister & Solicitor

ONTARIO HUMAN RIGHTS COMMISSION

Dan McIntyre, Race Relations Commissioner, Prov. of Ontario
Dan D'Ignazio, Policy Analyst, Race Relations Division

THE REGENT PARK ADVISORY COMMITTEE ON POLICE COMMUNITY RELATIONS

Charles Smith, Community Relations Officer,
Metro Multicultural Race Relations
Jane Pepino, Chairman of Regent Park Advisory Committee
Aidan Mahar, 51 Division
Gerrard Jones, 51 Division

November 14, 1986

CADILLAC FAIRVIEW SHOPPING CENTRES

W. J. McNaughton, Weir & Foulds, Counsel
Mary-Jo Raycroft, Weir & Foulds, Student-at-Law
Geoffrey J. Harrison, Vice President, Operations

METRO TENANTS LEGAL SERVICES

Peter Holt, Community Legal Worker

PARKDALE COMMUNITY LEGAL SERVICES INC.

David R. Draper, Staff Lawyer
Patrick Case, Student-at-Law

IRENE PENGELLY

Former chairman of Division 31, Committee on Race Relations and Policing

November 20, 1986

CITY OF OTTAWA - Department of Community Development

Peter T. Mercer, General Manager Downtown Rideau Board of Management
Cyril Dabydeen, Co-ordinator, Visible Minorities
Wilf Koppert, Project Manager, Rideau Mall Study
Brenda Dagenais, Legal Department
Jack Trembley, Security Manager, Hudson Bay Company
Francine Trohe, Crime Prevention Council of Canada

OTTAWA AND DISTRICT LABOUR COUNCIL

John Baglow, Executive Secretary

SANKEY PARTNERSHIP

David S. McRobie, MRAIC MOAQ

November 21, 1986

MCGILL UNIVERSITY

David Brown, Department of Urban Planning
David Maclean, Department of Social Work
Peter Sijpkes, Faculty of Architecture
Michael Ellis, Master's Degree Candidate Department of Urban Planning

December 4, 1986

CANADIAN INSTITUTE OF PUBLIC REAL ESTATE COMPANIES

Ronald A. Daniel, Executive Director
Roland Jolicoeur, Senior Vice President Cadillac Fairview Shopping Centres

THE BOARD OF EDUCATION FOR THE CITY OF TORONTO

Martin Peters, Shibley, Righton & McCutcheon, Counsel
John P. Bell, Shibley, Righton & McCutcheon, Counsel

DAVID WARNER MPP, Scarborough Ellesmere, N.D.P. Youth Critic

December 10, 1986

EXHIBITION PLACE

Tom Cooke, General Manager, Security
Harry Poch, Legal Department, The Municipality of Metropolitan Toronto

HOTEL SECURITY CHIEFS' ASSOCIATION

Tom Mugford, Security Supervisor, City of Toronto
Eric Robb, Director of Security, The Sheraton Centre
Paul J. Hendrick, Security Manager, Toronto Convention Centre

JANE FINCH COMMUNITY LEGAL SERVICES

Michael Bossin, Staff Lawyer
Greg Regis, Staff Lawyer

UNIVERSITY OF TORONTO

Janice Oliver, Assistant Vice-President Facilities and Administrative Systems

Robert Crouse, Director of Phys. Plant
Greg Albright, Police Chief, U.of T.

December 22, 1986

CAMBRIDGE LEASEHOLDS LIMITED

R. L. Meiers, Vice President, Operations

CITY OF TORONTO - Planning & Development Department

Allen Appleby, Area Planner
John Philips, Lawyer, Legal Department

MARATHON REALTY COMPANY LIMITED

R. Molgat, General Manager, Shopping Centres Eastern Canada
J. Smillie, Operations Manager,Shopping Centres Eastern Canada
J. Rogers, Fraser & Beatty, Counsel

TRILEA CENTRES INC.

Charles A. Finnbogason, Director of Operations
William K. Seli, Vice President, Shopping Centres

January 5, 1987

INTERNATIONAL COUNCIL OF SHOPPING CENTRES

Yvonne J. Hamlin, Goodman and Carr, Counsel

HON. BOB KAPLAN, P.C., Q.C., M.P. - Ottawa

INTERCON SECURITY LIMITED

David McLoughlin, Account Executive

VISCOUNT HOTEL

Ian Maxwell, General Manager

January 12, 1987

JUSTICE FOR CHILDREN ADVISORY COMMITTEE

January 13, 1987

WEST END ALTERNATIVE SCHOOL

January 14, 1987

SCADDING COURT COMMUNITY CENTRE

Josie Hayes, Administrative Co-ordinator
Gary Martin, Facility Co-ordinator
Frank Pimintel, Downtown Churchworkers
Neil Langley, Teacher

SEED SCHOOL

January 15, 1987

ZUBEDA POONJA

January 26, 1987

MINISTRY OF HOUSING

B. R. LeMesurier, Senior Solicitor, Legal Branch.

APPENDIX 5

ADVISORY COMMITTEE

CADILLAC FAIRVIEW SHOPPING CENTRES

W. J. McNaughton, Weir & Foulds, Counsel
Mary-Jo Raycroft, Weir & Foulds, Student-at-Law
Geoffrey J. Harrison, Vice President Operations

CANADIAN INSTITUTE OF PUBLIC REAL ESTATE COMPANIES

Ronald A. Daniel, Executive Director

MICHAEL ELLIS - Master's Degree Candidate
Department of Urban Planning
McGill University

INTERNATIONAL COUNCIL OF SHOPPING CENTRES

Yvonne J. Hamlin, Goodman and Carr, Counsel

METROPOLITAN TORONTO POLICE

Sergeant Robert Silverton

PARKDALE COMMUNITY LEGAL SERVICES INC.

Patrick Case - Student-at-Law

SCADDING COURT COMMUNITY CENTRE

Josie Hayes, Administrative Co-ordinator

UNIVERSITY OF TORONTO - Centre of Criminology

Philip C. Stenning, Senior Research Associate and
Co-ordinator of Graduate Studies.

APPENDIX 6

CADILLAC FAIRVIEW SUBURBAN MALLS

MALL	NUMBER OF TENANTS	BAN NOTICES YEARLY	CHARGES LAID YEARLY
1. Cataraqui Town Centre (Kingston)	110	24	0.5
2. Fairview (North York)	127 retail 11 offices	24	4
3. Hillcrest (Toronto)	119 retail 13 offices	36	5
4. Cedarbrae (Scarborough)	71 retail 15 offices	60	12
5. Woodbine (Etobicoke)	188	86	N/A
6. Georgian (Barrie)	112	25	0
7. Lansdowne (Peterborough)	71	30	N/A
8. The Promenade (Thorn Hill)	215	36	N/A
9. Don Mills Plaza	110 retail 5 offices	24	7

APPENDIX 7

WRITTEN TRESPASS NOTICES ISSUED FOR MAY, 1986

96 notices issued

Age of Individuals Banned

20 and under	20 - 30	Over 30
45	27	24

Reasons for Notices Being Issued

Drunkennes or drinking in the Centre	11
Disorderly conduct (including shouting or swearing)	4
Previously Banned by Notice under Act	4
Suspected shoplifting (including being caught in possession of stolen goods)	18
Loitering (Including sleeping)	24
Prohibited Activities (including smoking marijuana or carrying weapons)	15
Gross indecency (including public sex acts)	4
Assault (on security officers or other individuals)	6
Soliciting (including begging, panhandling, eating garbage)	5
Entering a restricted access area	4
Trespass arrests for May, 1986	45

TRESPASS ARRESTS FOR THE PERIOD JANUARY 2, 1986 TO FEBRUARY 4, 1986
106 individuals arrested in total

Reasons for Arrest

Previously Banned by Notice under Act	74
Loitering	10
Soliciting	3
Drunkenness or drinking	7
Disorderly Conduct	10
Unknown (cannot tell from security report)	12
Banning Notices for the same period	169

APPENDIX 8

SHOPPING CENTRE TRESPASS EXPERIENCE

LOCATION	(1) Traffic 000's p.a.	(2) No. p.a. of Barrs-Arrests		(3) Ratio to Traffic Barrs-Arrests 1 incident per		(4) Area sq ft in 000's	Security Budget p.a.	Security Cost per sq
Metro-Toronto								
Jane-Finch								
Sheridan, Jane & Wilson	3,750	35-40	10	100,000	375,000	250	$ 93,000	$ 0.372
Jane & Finch Mall	2,500	32 (approx)		78,000		231	125,000	0.541
Rexdale Plaza	1,500	20 (approx)		75,000		222	50,000	0.225
North-West								
Yorkdale	10,088	1	n/a	10 million	n/a	1,500	223,000	0.148
Albion	4,680	30	n/a	156,000	n/a	394	108,000	0.274
Downtown-Core								
Eaton Centre	50,000	958	519	50,000	100,000	n/a	n/a	n/a
College Park	9,000	710	241	12,500	37,344	1,500	450,000	0.30
Dufferin/Bloor	6,700	190	64	35,000		600	175,000	0.291
East								
Scarborough	10,036	24	n/a	416,000	n/a	1,412	161,000	0.114
Danforth	3,432	1	n/a	3,432,000	n/a	322	44,000	0.136
Agincourt	2,200	2				268	27,000	0.100
Ontario - Cities								
Peterborough	2,300	41		56,000		250	40,000	0.160
Kitchener	2,900	75		39,000		255	27,000	0.106
Cambridge	750	1		750,000		70	2,000	0.028
Ottawa	1,700	4		425,000		202	1,000	0.004
Suburban								
Waterloo	1,500	0		-				
Brampton	6,916	89	n/a	77,700		1,000	91,000	0.091
Ottawa	1,900	19		100,000		247	25,000	0.100
London	1,700	6		28,000		282	25,000	.090
Markham	3,172	1	n/a	3,172,000	n/a	306	80,000	0.260

Shopping Centre	Instances of Banning under Petty Trespass Act. (1985 - 86) (12 month period)	Reasons	Annual Traffic
Yorkdale	1	- breaking into cars	10,088,000
Scarborough Town Centre	24	- Breaking & Entering - Shoplifting (8) - Indecent Exposure - Assault (4) - Property Damage (3) - Drunk & Disorderly (5) - Possession of Stolen Goods & Carrying A Concealed Weapon (2)	10,036,000
Markham Place	0	--	3,172,000
Shoppers World Albion	30	- Destroying Private Property - Shoplifting (2) - Obstructing Justice - Drunk & Disorderly (6) - Assault (4) - Loitering (7) - Fighting - Possession of Drugs - Causing a Disturbance (7)	4,680,000
Shoppers World Brampton	89	- Shoplifting (34) - Causing A Disturbance (12) - Possession / Use of Narcotics (11) - Vandalism (9) - Assault (4) - Loitering (8) - Break & Enter (1) - Truancy (1) - Panhandling (1) - Alcohol Related (under age & Drinking in Mall) (10)	6,916,000
Shoppers World Danforth	1	- Shoplifting	3,432,000
Six (6) Shopping Centres	145 instances		38,324,000

SHOPPING CENTRE	LOCATION	AREA	RENTABLE FEET	TRAFFIC	1985 SECURITY COSTS	1985 BARR NOTICES	MALES	FEMALE	AGE 20-UNDER	21-35	36-55	Over 55
Westmount Place	Waterloo	Suburb	216,200	1,500,000	$ 1,000	0	0	0	0	0	0	0
Peterborough Square	Peterborough	Downtown	250,000	2,300,000	$ 40,000	41	33	8	21	12	6	2
Merivale Mall	Ottawa	Suburb	247,200	1,900,000	$ 25,000	19	19	0	10	7	2	0
Agincourt Mall	Scarborough	Suburb	268,800	2,200,000	$ 27,000	2	2	0	0	2	0	0
Argyle Mall	London	Suburb	282,600	1,700,000	$ 25,000	6	5	1	5	1	0	0
Dufferin Mall	Toronto	Old City	564,000	6,700,000	$165,000	190	135	55	103	45	32	10
Place d'Orleans	Orleans	Suburb	252,000	2,200,000	$ 35,000	5	5	0	5	0	0	0
King Centre	Kitchener	Downtown	254,800	2,900,000	$ 27,000	75	65	10	36	12	22	5
Herongate Mall	Ottawa	Suburb	202,700	1,700,000	$ 2,000	4	2	2	4	0	0	0
The Mall	Cambridge	Downtown	69,800	750,000	$ 2,000	1	1	0	0	0	1	0

APPENDIX 9

BRAMALEA LIMITED

Shopping Centres

Bramalea City Centre	Brampton
Niagara Pen Centre	St. Catharines
Southbridge Mall	Sudbury
410 & 7 Shopping Centre	Brampton
Harwood Place Mall	Ajax
Queenston Mall	Hamilton
Royal Orchard Mall	Thornhill
Northgate Plaza	Brampton
Southgate Plaza	Brampton
Convenience Centre	Brampton
Amberlea Shopping Centre	Pickering

Gross leaseable area	2,621,000 sq.ft.
Annual traffic count	17,328,000
Ban notices	375 (1 per 46,208 visits)
Arrests	559 (1 per 30,998 visits)

Breakdown of a random 357 incidents:

Arrests	160		
Ban Notices	197	for loitering	82
		suspicious activity	30
		theft under	25
		drugs	19
		intoxication	12
		general	7
		assault	6
		theft over	4
		concealed weapon	3
		fighting	3
		fraud	2
		sex act	2
		vandalism	1
		obscene language	1

... 2

Of the 160 trespass charges laid, a substantial number are multiple offenders. 26 individuals were directly responsible for the laying of 119 trespass charges. Of these multiple offenders, 2 individuals were responsible for 70 charges laid. One individual was solely responsible for 39 charges and during his last appearance, the judge levied a $1,000 fine. The original occurrence for this individual was drug-related.

APPENDIX 10

REGIONAL CENTRES	MAJOR TENANTS	TOTAL RENTABLE AREA
Burlington Mall, Burlington	Sears, Eatons, Robinsons, K-Mart, Dominion	730,000
Devonshire Mall, Windsor	Sears, Hudson's Bay Miracle Mart, Miracle Food Mart	826,000
Quinte Mall, Belleville	Sears, K-Mart, Miracle Food Mart	402,000
Bayshore Shopping Centre, Ottawa	Hudson's Bay, Eatons Miracle Mart, Steinberg	654,000
Lynden Park Mall, Brantford	Sears, K-Mart, Miracle Food Mart	353,000
Upper Canada Mall, Newmarket	Sears, Zellers, New Dominion	357,000
Gerrard Square, Toronto	Sears, Zellers, Miracle Food Mart	330,000
Niagara Square, Niagara Falls	Robinsons, K-Mart, Quality Fare	362,000
Conestoga Mall, Waterloo	K-Mart, Robinsons, Zehrs	350,000
COMMUNITY CENTRES		
Tecumseh Mall Windsor	K-Mart, Zellers, New Dominion	252,000
University Mall, Windsor	Zellers, Miracle Food Mart	151,000
County Fair Mall, Smith Falls	Zellers, A&P	134,000

DOWNTOWN CENTRES

Waterloo Town Square, Waterloo	K-Mart, Zehrs	227,500
Downtown Windsor, Windsor		197,000
Market Square, Kitchener	Eaton's, Farmers' Market	282,000
Cornwall Square, Cornwall	Sears, Steinberg	256,000
Downtown Chatham Centre, Chatham	Sears, Miracle Food Mart	256,000

APPENDIX 11

PUBLIC NOTICE

By-law No. 1 A By-law relating generally to the conduct of persons using the public transit system and property of the Toronto Transit Commission provides as follows:

1. No person shall smoke, carry lighted pipes, cigars, or cigarettes, on any vehicle, or expectorate or commit any nuisance in or upon any vehicle or premises of the Commission.

2. No person shall ride or stand on any exterior portion of any vehicle operated by the Commission, nor lean out of, nor project any portion of his body through any window of such vehicle, nor project any part of his body beyond the edge of any subway, bus or streetcar platform except to enter or leave a transit vehicle.

3. No person other than an official or employee of the Commission shall handle or operate any part of the mechanical or electrical equipment of any vehicle operated by the Commission, or any equipment, devices or cars used in connection with the rapid transit system, except devices which are intended for passenger use, and then only in accordance with posted regulations.

4. Passengers must pay the exact price for their journey either by depositing in the fare box the necessary sum of money or the number of tickets or tokens required, or by presenting a transfer or other valid instrument issued by the Commission. Operators are not required to sell tickets or tokens or make change; at subway stations, subway collectors and other employees selling tickets or tokens are not required to change bills of a higher denomination than $20.00 and any person refusing to make any other tender than that aforesaid in payment of his fare shall be deemed to be refusing to pay his fare.

5. No person shall remove from any vehicle or premises of the Commission any valuable or article left therein through apparent inadvertence, but such valuable or article shall be left in the possession of the Commission or its employees for disposition according to law.

6. No person shall enter any vehicle or any part of the Commission's rapid transit system at other than a designated passenger entrance, or having entered, loiter therein or linger without due cause. No unauthorized person shall ride on a Commission vehicle or enter any fare-paid area unless the appropriate fare has been paid. No person shall sell, exchange or give away a transfer, or accept or use any transfer except it has been issued under payment of a fare.

7. No person shall sell, or attempt to sell, any newspaper, magazine, merchandise or any other article or thing, distribute any pamphlet or literature, or solicit members of the public for any purpose whatsoever in any of the Commission's stations, premises or vehicles except by permission of the Commission first obtained.

8. No person except in the conduct of the Commission's business shall operate any radio, tape recorder or similar device in or upon any vehicle or premise of the Toronto Transit Commission unless the sound therefrom is conveyed to that person by an earphone.

Signed J. Porter, QC
Chairman
TORONTO TRANSIT COMMISSION

Signed D.C. PHILLIPS
General Secretary

Certified to be a true copy
of Toronto Transit Commission
By-Law 1 as approved by the
Ontario Municipal Board on
Wednesday, July 22nd, 1981.

Chairman

General Secretary

xxx

By-Law #1, a By-Law relating generally to the conduct of persons using the public transit system and property of the Toronto Transit Commission, provides as follows:

1. In this By-Law:

(a) Authorization: Means written permission from the Toronto Transit Commission, received prior to the time the action is to occur.

(b) Loitering: Means to linger unduly on the way, when making a journey on the Transit System.

(c) Nuisance: Shall include any obnoxious or annoying conduct or behaviour which interferes with the ordinary enjoyment of persons using the Transit System.

(d) Premises: Shall include all Subway Stations, buildings, properties, easements and rights of way owned or occupied by the Commission.

(e) Rapid Transit: Shall include Subway trains, Intermediate capacity trains, and premises on which they operate.

(f) Service Line: Means an indoor line of two or more persons awaiting service of any kind, regardless of whether or not such service involves the exchange of money, including but not limited to, sales, provision of information, transactions, or advice and transfers of money or goods.

(g) Smoke: Includes the carrying of a lighted cigar, cigarette, pipe, or any other lighted smoking equipment.

(h) Soliciting: Includes the offering or making available in any way, or communicating to any person, the availability of, or the attempt to obtain, any newspaper, magazine, merchandise, valuable, service, or any other article or thing.

(i) Vehicles: Shall include Buses, Trolley Coaches, Streetcars, Light Rail vehicles and Rapid Transit trains owned or operated by the Commission.

.../2

2. (a) No person shall smoke, on any vehicle, on any elevator, escalator, in any service line, in any public area of the Rapid Transit System, or in any area designated as a "No Smoking" area, on premises of the Commission.

(b) No person other than a uniformed employee of the Commission on duty shall consume or carry in an open container, any food or drink on any of the Commission's vehicles or in any of the fare paid areas of the Commission's stations, other than an area specifically designated by the Commission, for the consumption of food or drink.

3. No person shall commit any nuisance, disturb the peace, or act contrary to public order, in or upon any vehicle or premises of the Commission.

4. No person shall expectorate in or upon any vehicle or premises of the Commission.

5. No person shall litter on Commission property. Refuse of any kind must be placed in the containers provided for such purpose.

6. No person shall loiter on any premises or on any vehicle of the Commission.

7. No person shall sell or attempt to sell, distribute or solicit on any vehicle or premises of the Commission without authorization.

8. (a) No passenger shall ride on a Commission vehicle or enter any fare paid area unless the appropriate fare has been paid by either depositing in the farebox the exact sum of money or the number of tickets or tokens required, or by presenting a valid Metropass, transfer, or other valid instrument issued by the Commission.

(b) A person entitled to a reduced fare shall present his valid reduced fare identification card upon payment of such reduced fare. In the event that such person fails to present a

.../3

valid indentification card, a full adult fare will be required.

(c) The holders of Metropasses, passes, and permits shall comply with the conditions of use.

(d) Metropasses, passes, and permits issued by the Commission shall be surrendered for inspection to a person in authority, if requested, when on vehicles or premises of the Commission.

(e) No person shall enter any vehicle or any part of the Commission's Rapid Transit system at other than a designated passenger entrance without authorization.

(f) Operators are not permitted to sell tickets or tokens or make change. Subway Collectors and other employees selling fare media are not required to change bills of a higher denomination than $50.00 Canadian or $10.00 American, and any person refusing to make any other tender than the aforesaid in payment of his fare shall be deemed to be refusing to pay his fare.

9. (a) Upon payment of the fare, a person is entitled to be issued one transfer. A person tendering a Metropass or other valid pass issued by the Commission is not entitled to a transfer.

(b) Persons possessing valid transfers shall comply with the conditions of use.

(c) No person shall accept or use any transfer unless it has been issued to that person upon payment of a fare, or in an emergency situation at such other times as a mishap or delay occurs.

(d) No person shall sell, exchange or give away a transfer.

10. No person shall ride or stand on any exterior portion of any vehicle, or lean out of or project his body through any window of any vehicle operated by the Commission.

.../4

11. No person shall project his body beyond the edge of any platform, except to enter or leave a Transit vehicle.

12. Passengers shall not place themselves in a position likely to interfere with the Operator of a vehicle having control of a vehicle, or obstruct the Operator's vision.

13. No unauthorized person shall enter upon or cross over the tracks of the Rapid Transit system.

14. No unauthorized person shall handle or operate any part of the mechanical, electrical or electronic equipment of any vehicle operated by the Commission, or any equipment or devices used in connection with the Transit System, except devices which are intended for passenger use, and then only in accordance with posted regulations.

15. All persons on a vehicle or the premises of the Commission must comply with the posted By-Law and regulations of the Commission. Where an employee of the Commission considers it reasonably necessary to (a) ensure orderly movement of persons, (b) prevent injury or damage to persons or property, or (c) permit proper action in an emergency, a person must follow that employee's instructions.

16.(a) No person, without authorization, shall operate any radio, tape recorder, musical instrument, or similar device in or upon any vehicle or premises of the Toronto Transit Commission unless the sound therefrom is conveyed to that person by an earphone at a sound level that does not disturb other passengers.

(b) No person, shall operate for commerical purposes any camera, video recording device, movie camera, or any similar device upon any vehicle or premises of the Commission without authorization.

.../5

17. Bicycles, skis, sleds, toboggans, and other large objects likely to inconvenience or jeopardize the safety of other passengers are not allowed on any vehicle of the Commission during the hours of 0630 hours to 0930 hours and 1530 hours to 1830 hours, Monday to Friday inclusive, during an emergency, or at any other time that vehicles are heavily loaded.

18. No person shall remove from any vehicle or premises of the Commission any valuable or article left therein through apparent inadvertence, but such valuable or article shall be left in the possession of the Commission or its employees for disposition according to law.

19. No person shall carry, nor shall the Commission be required to carry on any vehicle, any goods which are of an offensive, dangerous, toxic, flammable or explosive nature that are likely to alarm, inconvenience, cause discomfort, or injure any person, or cause damage to property, whether or not such goods are contained in an approved container, without authorization.

20. Animals shall not be allowed on vehicles of the Commission except (a) dogs while on a leash, (b) small animals when carried without danger or offence to passengers, or (c) dogs used as guides i.e. seeing eye dogs or hearing dogs.

21. In this By-Law, unless the context otherwise requires, words importing the single number shall include the plural, and words importing the masculine gender shall include the feminine.

MAXIMUM PENALTY FOR ANY VIOLATION OF

THE FOREGOING BY-LAW IS $500.00

Revised September 24, 1986

Dated at Toronto this 15th day of October, 1986.

TORONTO TRANSIT COMMISSION

Per:

_____

_____

APPENDIX 12

UNIVERSITY OF TORONTO
ST. GEORGE CAMPUS

TRESPASS NOTICE

To:

You have been found trespassing at the University of Toronto at _____ a.m./p.m. on the_____ of _____ 19_____ . This is therefore notice to you that this act is a violation of the law and that, if you trespass upon the University of Toronto property in the future, without having first obtained written permission from the University of Toronto Police, you may be prosecuted for any such actions to the full extent of the law.

_____
Date

_____
Special Constable

Please acknoweledge receipt of this notice.

_____
Signature

APPENDIX 13
INTERNAL CORRESPONDENCE

To Sgt. R. Breen — From B. Mok, Statistical Analyst,
Operational Planning — Records Bureau
Date July 17, 1986

Re STATISTICS - TRESPASSING OFFENCES UNDER PROVINCIAL STATUTES

Clearance	1983	1984	1985	1986 (upto July
P.O.T.	3310	3756	2790	2097
Arrest	377	188	251	123
Summons	154	96	91	51
Adults - warned & released	1	0	12	5
Juvenile - warned & released	0	1	27	13
No charge	8	33	40	14
Total :	3850	4074	3211	2303

B. Mok

B.Mok,
Statistical Analyst,
Records Bureau.

STATISTICS - DIVISIONAL COMPARISON

PETTY TRESPASSING (POA) - 1984

DIVISION	Enter Premises when entry prohibited (PT2-1A1)	Engage in Prohibited Activity on Premises (PT2-1A2)	Fail to leave premise when directed (PT2-1B)
CTU	-	-	-
ETU	-	-	-
WTU	-	-	-
11	32	4	24
12	32	7	7
13	24	-	8
14	209	16	60
21	40	1	21
22	16	3	2
23	122	5	29
31	112	7	26
32	59	55	33
33	51	-	18
41	67	8	36
42	46	9	21
43	69	5	32
51	162	27	64
52	1209	309	468
53	29	15	13
54	40	9	19
55	150	12	29
ETF	1	2	1
MAR	-	-	-
MOR	1	-	-
MTD	1	3	-
2HQ	18	-	-
3HQ	-	1	-

STATISTICS - DIVISIONAL COMPARISON

PETTY TRESPASSING (POA) - 1984

DIVISION	Enter Premises when entry prohibited (PT2-1A1)	Engage in Prohibited Activity on Premises (PT2-1A2)	Fail to leave premise when directed (PT2-1B)
1 TR	1	-	-
2 TR	15	-	-
3 TR	1	-	-
4 TR	-	-	-
POT	5	-	-
5TR	3	-	3
TOTAL:	2515	498	914

STATISTICS - DIVISIONAL COMPARISON

PETTY TRESPASSING (POA) - 1985

DIVISION	Enter Premises when entry prohibited (PT2-1A1)	Engage in Prohibited Activity on Premises (PT2-1A2)	Fail to leave premise when directed (PT2-1B)
CTU	4	-	-
ETU	-	-	-
WTU	-	-	-
11	10	1	9
12	8	-	6
13	12	1	6
14	124	8	66
21	26	2	13
22	17	-	4
23	162	1	10
31	140	5	31
32	56	26	20
33	42	2	10
41	52	17	32
42	24	-	12
43	67	1	17
51	76	7	23
52	1058	247	386
53	9	2	12
54	22	9	6
55	104	1	12
ETF	3	-	-
MAR	-	1	-
MOR	1	-	-
MTD	4	1	-
2HQ	17	-	-
3HQ	3	3	2

STATISTICS - DIVISIONAL COMPARISON

PETTY TRESPASSING (POA) - 1985

DIVISION	Enter Premises when entry prohibited (PT2-1A1)	Engage in Prohibited Activity on Premises (PT2-1A2)	Fail to leave premise when directed (PT2-1B)
1 TR	-	-	-
2 TR	-	-	-
3 TR	1	-	-
4 TR	1	1	-
POT	2	1	-
TOTAL:	2045	337	677

STATISTICS - DIVISIONAL COMPARISON

PETTY TRESPASSING (POA) - 1986

DIVISION	Enter Premises when entry prohibited (PT2-1A1)	Engage in Prohibited Activity on Premises (PT2-1A2)	Fail to leave premise when directed (PT2-1B)
CTU	15	1	1
ETU	-	1	-
WTU	3	-	-
11	27	-	10
12	9	3	6
13	1	-	2
14	94	7	25
21	10	2	10
22	14	-	8
23	167	1	11
31	68	6	13
32	39	15	14
33	18	6	7
41	45	9	26
42	20	2	3
43	37	2	9
51	43	32	7
52	799	198	320
53	13	1	2
54	25	2	10
55	41	1	13
ETF	-	-	-
MAR	-	-	-
MOR	-	-	-
MTD	-	2	-
2HQ	15	-	-
3HQ	-	-	-

PETTY TRESPASSING (POA) - 1986

DIVISION	Enter Premises when entry prohibited (PT2-1A1)	Engage in Prohibited Activity on Premises (PT2-1A2)	Fail to leave premise when directed (PT2-1B)
1 TR	-	-	-
2 TR	-	-	-
3 TR	-	-	-
4 TR	-	-	-
POT	5	-	-
TOTAL:	1508	291	497

APPENDIX 14

Breakdown of Petty Trespassing Charges by Age and Sex
Ontario Provincial Police
January 1985 - July 1986

TABLE OF AGEGR BY SEX

AGEGR(Age Group) SEX

Frequency / Percent / Row Pct / Col Pct	N/A	male	female	Total
10-14	0	20	3	23
	0.00	0.74	0.11	0.85
	0.00	86.96	13.04	
	0.00	0.82	1.21	
15-19	0	757	86	843
	0.00	28.06	3.19	31.25
	0.00	89.80	10.20	
	0.00	31.00	34.68	
20-24	0	747	48	795
	0.00	27.69	1.78	29.47
	0.00	93.96	6.04	
	0.00	30.59	19.35	
25+	8	918	111	1037
	0.30	34.03	4.11	38.44
	0.77	88.52	10.70	
	100.00	37.59	44.76	
Total	8	2442	248	2698
	0.30	90.51	9.19	100.00

Breakdown of Petty Trespassing Charges by Period of Year and Age Group
Ontario Provincial Police
January 1985 - December 1985

TABLE OF MONTHGR BY AGEGR

MONTHGR / AGEGR	10-14	15-19	20-24	25+	Total
Jan-April	0	81	85	134	300
	0.00	5.08	5.33	8.41	18.82
	0.00	27.00	28.33	44.67	
	0.00	15.43	18.48	22.60	
May-August	12	270	266	261	809
	0.75	16.94	16.69	16.37	50.75
	1.48	33.37	32.88	32.26	
	75.00	51.43	57.83	44.01	
Sep-Dec	4	174	109	198	485
	0.25	10.92	6.84	12.42	30.43
	0.82	35.88	22.47	40.82	
	25.00	33.14	23.70	33.39	
Total	16	525	460	593	1594
	1.00	32.94	28.86	37.20	100.00

Breakdown of Petty Trespassing Charges by Age Group and Time
Ontario Provincial Police
January 1985 - July 1986

TABLE OF TIMPD BY AGEGR

TIMPD / AGEGR	10-14	15-19	20-24	25+	Total
00:00 to 02:59	3	157	127	130	417
	0.11	5.82	4.71	4.82	15.46
	0.72	37.65	30.46	31.18	
	13.04	18.62	15.97	12.54	
03:00 to 05:59	2	39	60	74	175
	0.07	1.45	2.22	2.74	6.49
	1.14	22.29	34.29	42.29	
	8.70	4.63	7.55	7.14	
06:00 to 08:59	0	35	33	44	112
	0.00	1.30	1.22	1.63	4.15
	0.00	31.25	29.46	39.29	
	0.00	4.15	4.15	4.24	
09:00 to 11:59	1	58	59	103	221
	0.04	2.15	2.19	3.82	8.19
	0.45	26.24	26.70	46.61	
	4.35	6.88	7.42	9.93	
12:00 to 14:59	6	118	125	166	415
	0.22	4.37	4.63	6.15	15.38
	1.45	28.43	30.12	40.00	
	26.09	14.00	15.72	16.01	
15:00 to 17:59	1	107	117	192	417
	0.04	3.97	4.34	7.12	15.46
	0.24	25.66	28.06	46.04	
	4.35	12.69	14.72	18.51	
18:00 to 20:59	7	137	104	158	406
	0.26	5.08	3.85	5.86	15.05
	1.72	33.74	25.62	38.92	
	30.43	16.25	13.08	15.24	
21:00 to 23:59	3	192	170	170	535
	0.11	7.12	6.30	6.30	19.83
	0.56	35.89	31.78	31.78	
	13.04	22.78	21.38	16.39	
Total	23	843	795	1037	2698
	0.85	31.25	29.47	38.44	100.00

Breakdown of Petty Trespassing Charges by Month and Year
Ontario Provincial Police
January 1985 - July 1986

TABLE OF YEAR BY MONTH

YEAR / Frequency / Percent / Row Pct / Col Pct	MONTH January	February	March	April	May	June	July	August	September	October	November	December	Total
Jan-Dec 1985	73	33	96	98	189	158	202	260	168	122	120	75	1594
	2.71	1.22	3.56	3.63	7.01	5.86	7.49	9.64	6.23	4.52	4.45	2.78	59.08
	4.58	2.07	6.02	6.15	11.86	9.91	12.67	16.31	10.54	7.65	7.53	4.71	
	46.20	28.70	53.33	40.00	44.89	40.62	45.39	100.00	100.00	100.00	100.00	100.00	
Jan-July 1986	85	82	84	147	232	231	243	0	0	0	0	0	1104
	3.15	3.04	3.11	5.45	8.60	8.56	9.01	0.00	0.00	0.00	0.00	0.00	40.92
	7.70	7.43	7.61	13.32	21.01	20.92	22.01	0.00	0.00	0.00	0.00	0.00	
	53.80	71.30	46.67	60.00	55.11	59.38	54.61	0.00	0.00	0.00	0.00	0.00	
Total	158	115	180	245	421	389	445	260	168	122	120	75	2698
	5.86	4.26	6.67	9.08	15.60	14.42	16.49	9.64	6.23	4.52	4.45	2.78	100.00

Breakdown of Petty Trespassing Charges
Day of Week and Time Period, by Age Goup
Ontario Provincial Police
January 1985 - July 1986

		Age Group			
		10-14	15-19	20-24	25+
		count	count	count	count
Day of Week	Time Period				
Sunday	00:00 to 02:59	.	45	33	26
	03:00 to 05:59	.	13	25	38
	06:00 to 08:59	.	1	9	11
	09:00 to 11:59	.	10	13	20
	12:00 to 14:59	2	38	34	34
	15:00 to 17:59	.	18	28	48
	18:00 to 20:59	2	12	15	13
	21:00 to 23:59	.	12	27	25
Monday	Time Period				
	00:00 to 02:59	1	17	11	6
	03:00 to 05:59	.	2	.	6
	06:00 to 08:59	.	1	2	2
	09:00 to 11:59	.	5	3	8
	12:00 to 14:59	.	17	12	8
	15:00 to 17:59	.	15	16	15
	18:00 to 20:59	1	22	13	5
	21:00 to 23:59	.	14	12	14
Tuesday	Time Period				
	00:00 to 02:59	.	3	6	9
	03:00 to 05:59	2	5	2	4
	06:00 to 08:59	.	3	2	2

(CONTINUED)

Breakdown of Petty Trespassing Charges
Day of Week and Time Period, by Age Goup
Ontario Provincial Police
January 1985 - July 1986

		Age Group			
		10-14	15-19	20-24	25+
		count	count	count	count
Day of Week	Time Period				
Tuesday	09:00 to 11:59	.	8	8	11
	12:00 to 14:59	2	15	21	29
	15:00 to 17:59	1	11	14	15
	18:00 to 20:59	.	28	12	23
	21:00 to 23:59	.	15	21	15
Wednesday	Time Period				
	00:00 to 02:59	.	6	9	18
	03:00 to 05:59	.	3	3	3
	06:00 to 08:59	.	2	4	5
	09:00 to 11:59	.	10	1	5
	12:00 to 14:59	1	14	10	26
	15:00 to 17:59	.	18	10	15
	18:00 to 20:59	3	17	7	22
	21:00 to 23:59	2	19	16	14
Thursday	Time Period				
	00:00 to 02:59	.	16	10	12
	03:00 to 05:59	.	1	1	3
	06:00 to 08:59	.	1	.	2
	09:00 to 11:59	.	8	5	13
	12:00 to 14:59	.	10	4	12
	15:00 to 17:59	.	12	14	16

(CONTINUED)

Breakdown of Petty Trespassing Charges
Day of Week and Time Period, by Age Goup
Ontario Provincial Police
January 1985 - July 1986

		Age Group			
		10-14	15-19	20-24	25+
		count	count	count	count
Day of Week	Time Period				
Thursday	18:00 to 20:59	1	12	11	23
	21:00 to 23:59	.	19	14	23
Friday	Time Period				
	00:00 to 02:59	.	22	13	21
	03:00 to 05:59	.	3	11	4
	06:00 to 08:59	.	2	2	6
	09:00 to 11:59	.	6	8	17
	12:00 to 14:59	1	9	5	17
	15:00 to 17:59	.	11	13	34
	18:00 to 20:59	.	24	16	24
	21:00 to 23:59	1	59	37	32
Saturday	Time Period				
	00:00 to 02:59	2	48	43	38
	03:00 to 05:59	.	12	18	16
	06:00 to 08:59	.	25	14	16
	09:00 to 11:59	1	11	21	29
	12:00 to 14:59	.	15	39	40
	15:00 to 17:59	.	22	22	49
	18:00 to 20:59	.	32	30	48
	21:00 to 23:59	.	54	43	47

Breakdown of Petty Trespassing Charges by OPP District
Ontario Provincial Police
January 1985 - July 1986

TABLE OF DIST BY SEX

DIST(District)	SEX			
Frequency Percent Row Pct Col Pct	N/A	male	female	Total
Chatham	0 0.00 0.00 0.00	325 12.05 91.29 13.31	31 1.15 8.71 12.50	356 13.19
London	0 0.00 0.00 0.00	143 5.30 89.37 5.86	17 0.63 10.62 6.85	160 5.93
Burlington	0 0.00 0.00 0.00	106 3.93 92.98 4.34	8 0.30 7.02 3.23	114 4.23
Downsview	0 0.00 0.00 0.00	250 9.27 92.25 10.24	21 0.78 7.75 8.47	271 10.04
Mount Forest	2 0.07 0.61 25.00	299 11.08 90.61 12.24	29 1.07 8.79 11.69	330 12.23
Barrie	1 0.04 0.47 12.50	188 6.97 89.10 7.70	22 0.82 10.43 8.87	211 7.82
Peterborough	1 0.04 0.76 12.50	121 4.48 92.37 4.95	9 0.33 6.87 3.63	131 4.86
Belleville	0 0.00 0.00 0.00	183 6.78 90.59 7.49	19 0.70 9.41 7.66	202 7.49
Total	8 0.30	2442 90.51	248 9.19	2698 100.00

(Continued)

Breakdown of Petty Trespassing Charges by OPP District
Ontario Provincial Police
January 1985 - July 1986

TABLE OF DIST BY SEX

DIST(District)	SEX			
Frequency Percent Row Pct Col Pct	N/A	male	female	Total
Perth	0	68	7	75
	0.00	2.52	0.26	2.78
	0.00	90.67	9.33	
	0.00	2.78	2.82	
Long Sault	0	135	6	141
	0.00	5.00	0.22	5.23
	0.00	95.74	4.26	
	0.00	5.53	2.42	
North Bay	0	58	3	61
	0.00	2.15	0.11	2.26
	0.00	95.08	4.92	
	0.00	2.38	1.21	
Sudbury	0	61	9	70
	0.00	2.26	0.33	2.59
	0.00	87.14	12.86	
	0.00	2.50	3.63	
Sault Ste. Marie	1	123	4	128
	0.04	4.56	0.15	4.74
	0.78	96.09	3.13	
	12.50	5.04	1.61	
South Porcupine	1	71	11	83
	0.04	2.63	0.41	3.08
	1.20	85.54	13.25	
	12.50	2.91	4.44	
Thunder Bay	1	117	11	129
	0.04	4.34	0.41	4.78
	0.78	90.70	8.53	
	12.50	4.79	4.44	
Kenora	1	194	41	236
	0.04	7.19	1.52	8.75
	0.42	82.20	17.37	
	12.50	7.94	16.53	
Total	8	2442	248	2698
	0.30	90.51	9.19	100.00

APPENDIX 15

GROUP SURVEYED ON TRESPASS LEGISLATION ENFORCEMENT

C.A.S.M.T. CLIENTS

1. "Jay Jay" - Street kid and sometimes prostitute - Regent Park/Downtown resident.
2. Thorncliffe Park Youth Group - Comprised of Filipino, white and South Asian adolescents.
3. Two teen prostituting residents of Moberly House - Tracy and Mark
4. Group of teen children in care at Dundas Admission Assessment Residence.

C.A.S.M.T. STAFF/PROGRAM

1. (a) Youth Team - Scarborough Branch (Family and Children's Services staff).
   (b) Youth Workers - Toronto West Branch.
2. Children's Services Team - North Branch.
3. Melville Admission Assessment Residence (Child Care Staff).
4. Moberly House: Teen Prostitution and Runaway Program (Child Care Staff).
5. (a) Family Support Team - Etobicoke Branch.
   (b) Family Support Team - Toronto West Branch.
6. Pape Adolescent Resource Centre.
7. Agency Multicultural Workers.
9. Independent Living casework specialist - Outside Resource Service.

COMMUNITY ORGANIZATIONS

1. Specialized Youth Unit - Scarborough - (Program of Canada Employment Centre).
2. Scarborough Youth Services - (Satellite of Huntley Youth Services).
3. Metro Toronto Youth Outreach Program - Scarborough - (Program of Youth Employment Services).
4. "Lucky" - Street Worker with Y.M.C.A. (A West Indian Black, former Regent Park resident).

5. Beaconhill Tenants Association - North Etobicoke.
6. Canadian Foundation on Children and the Law.
7. Jane-Finch Legal Clinic.
8. Downsview Community Legal Services.
9. Police Departments (3).
10. Metro Toronto Housing Authority -
    - Caledon Village/Lotherton Pathway Complex, North York
    - Regent Park Development.
11. Pelham Park Youth Project - West Toronto.

MULTICULTURAL ORGANIZATIONS

1. St. Clair Community Youth Council -
   Youth programs for West Indian and Italian groups.
2. Youth Group - Black Jamaican Background -
   High rise building tenants - North Etobicoke.
3. Federation of Chinese Canadians - Scarborough Chapter
4. University Settlement House.
5. Chinese Interpreter/Information Centre.
6. Immigrant Women's Centre.
7. Olivia Chow, Toronto Board of Education Trustee.
8. Chinese Canadian National Council - Toronto Chapter.

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